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No. 05-

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MRS. LEE KARR,

Petitioner,

v.

GEORGE PATAKI,
as Governor of the State of New York, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Congress exceeded its power when – to promote tribal economic interests – it chose Indian Gaming Regulatory Act's, 25 U.S.C. 2701 *et seq.* ("IGRA") compacting process, which requires States alone to bear substantial expense and burdens in the negotiation of and entry into a Tribal-State gaming compact that would permit tribes to conduct mega-billion dollar commercialized casino gaming - *despite such action by the State and its officials being in defiance of the century old prohibition on such gaming contained in the people's Constitution and their Bill of Rights.*

II. Whether IGRA expands the powers of the executive and legislative branches of State government beyond their enumerated powers, so that these branches of government could enter into a Tribal-State casino gaming compact - *despite their action being in defiance of the powers they possess under the State Constitution.*

III. Whether courts misperceive the qualified non-bright-line rule of *California v. Cabazon,* 480 U.S. 202 (1987) when they hold that because a State permits very limited charitable Class III gaming it must, under IGRA, allow tribes to conduct large-scale commercialized Class III casino gaming - *despite IGRA's express legislative history that Cabazon was only to be applied to Class II gaming and charitable gaming of any sort applies only to justify Class II gaming.*

PARTIES TO THE PROCEEDING

This Petition is filed on behalf of Mrs. Lee Karr, a citizen taxpayer, who was the plaintiff in the second action.

This proceeding originated as two separate actions, by plaintiffs Joseph Dalton, et al. and Mrs. Lee Karr. These actions were consolidated in the New York Supreme Court, Albany County. A Petition will also been filed by Joseph Dalton, et al.

George Pataki, in his capacity as Governor of the State of New York, the State of New York, the New York State Racing and Wagering Board, Arthur J. Roth, in his capacity as Commissioner of Taxation and Finance of the State of New York, the Division of the Lottery within the New York State Department of Taxation and Finance, the New York Racing Association, as operator of Aqueduct Racetrack, the Finger Lakes Racing Association, as operator of the Finger Lakes Racetrack, Yonkers Racing Corporation, as operator of Yonkers Raceway, Mid-State Raceway, Inc., as operator of Vernon Downs, and Monticello Raceway Management Incorporated, as operator of Monticello Raceway, were defendants in both the first and second actions and are respondents before this Court.

Park Place Entertainment ("Park Place" or "Hilton Hotels") the parent corporation of the Hilton Hotel Chain, was an intervenor in both the first and second actions and is a respondent before this Court. Park Place supports and advocates the position taken by the Governor and other State respondents.

Carl McCall, former Comptroller of the State of New York, is no longer a party to this action.

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The Judgment and Decision of the New York State Court of Appeals, decided May 3, 2005 and entered May 12, 2005, along with the dissents, are electronically reported at 2005 WL 1017641 and set forth in Appendix A (A1). The Opinion of the New York State Supreme Court, Appellate Division, Third Department, entered July 7, 2004 is reported at 11 A.D.3d 62, 780 N.Y.S.2d 47 (N.Y. App. Div. 2004) and set forth in Appendix B (A79). The Opinion of the New York State Supreme Court, Albany County, dated July 17, 2003 is unreported and set forth in Appendix C (A143).

The Opinion of Judge George Bundy Smith of the New York State Court of Appeals, concurring in part and dissenting in part, in the matter of *Saratoga County Chamber of Commerce v. Pataki* and dated June 12, 2003 is reported at 100 N.Y.2d 801, 825-833 and set forth in Appendix E (A156). The purpose of its inclusion is the recitation of New York's public policy towards gambling, the importance of its constitutional provisions, and the manner in which its citizens and its government, since colonial days, have treated commercial gaming as being anathema to the welfare of State citizens with any change having to be effected through a vote of the people as provided for in the State Constitution.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the New York State Court of Appeals pursuant to 28 U.S.C. 1257(a). The Judgment and Decision of the New York State Court of Appeals was entered on May 12, 2005. *See* Appendix

A (A1). A motion for reargument before the New York State Court of Appeals was denied July 6, 2005. *See* Appendix D (A154).

The Judgment and Decision dealt with substantial federal issues relating to IGRA: (1) the constitutionality of the compacting provisions of that statute; (2) whether courts misinterpret IGRA's provisions as enlarging the power of State officials in excess of those provided for in the State Constitution; and, (3) whether courts misinterpret IGRA's provisions as to the intended reach of the qualified non-bright-line rule of *Cabazon* as extending to Class III type commercialized casino gaming.

STATEMENT OF THE CASE

A. Introduction

Is Congress empowered to preempt State law and require a State to act in a substantial way to accomplish the declared purpose of a federal statute, when such action is in defiance of the State's Constitution and Bill of Rights? Even assuming *arguendo* the constitutionality of IGRA, does the Act independently expand the authority of the governor and legislature so that they may agree to a compact in violation of the rights of the people as expressed in their Bill of Rights and the amendment procedures set forth in their Constitution?

IGRA, as interpreted, significantly affects the interests of some 20 States where Class III gaming is prohibited either by

Constitution or law.[1] Each of these States has been required, in order to satisfy the federal purpose, to enter into a Tribal-State compact, enabling tribes to conduct mega-billion dollar Class III casino gaming on Tribal lands. A majority of the remaining States face litigation under the Act. Accordingly, a definitive response from this Court to the questions posed is of critical significance.

* * *

There are a number of verities that emerge from the principles established by this Court as set forth in *Reno v. Condon*, 528 U.S. 141 (2000); *Printz v. United States*, 521 U.S. 898 (1998); *New York v. United States*, 505 U.S. 168 (1992); and *South Carolina v. Baker*, 485 U.S. 505 (1988):

> 1) where Congress has plenary power it may legislate directly to establish gaming nationally on Tribal lands;
>
> 2) Congress can properly displace State law as part of the doctrine of preemption; and,
>
> 3) Congress can offer a "choice" or "option" to States by encouraging them to participate in a federal regulatory program as part of a

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[1] These states include, among others, Arizona, Idaho, Kansas, Minnesota, Nebraska, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, and Wisconsin.

cooperative effort to achieve the goal of a federal act.

On the other hand:

1) Congress, through IGRA, may not, and did not, enlarge the State legislative or gubernatorial power beyond the limitations contained in the State Constitution and Bill of Rights;

2) Congress and those supporting the Act can find no authority requiring a State to compact with another State or quasi-sovereign entity;

3) Congress may not conscript the State, leaving it no choice or option, but to carry substantial burdens in order to further the purpose of this federal gaming Act;

4) Congress may not require State officials to act in disobedience of their State Constitution with respect to gaming, when the people made the "ultimate decision" to prohibit this activity and placed the ban in their Bill of Rights in order to insure protection against governmental intrusion;

5) Congress may not require the State to enter the compacting process and coerce it, under the guise of affording it a supposed "choice," to agree to a compact or else face the Secretary of the Interior ("Secretary"), *after consultation only with the tribe*, prescribing procedures

permitting commercialized Class III gaming consistent with a compact selected by a mediator which will be binding upon the State;

6) Congress may not require States to take legislative action. In New York (*Saratoga County Chamber of Commere v. Pataki*, 100 N.Y. 2d 801 (2003)), entry into a compact requires legislative action. Thus, Tribal-State compacting as the means to effect the federal goal is in excess of Congress' power;

7) Congress may not interfere with and disrupt the enforcement scheme between State government and its citizens, which has made criminal the gaming activity that is the subject of the Act;

8) Congress may not act in a way that will, of necessity, diminish the confidence of the people of a State that their government will act to protect their fundamental rights; and,

9) Congress may not ignore that State sovereignty is not an end unto itself, but has, as one of its objectives, the protection of fundamental liberties and rights of citizens, affording citizens "double security" (as James Madison wrote in *Federalist No. 51*). The State is not empowered to consent to or waive any of these rights.

Under the principles of *Reno* it is not enough to conclude that State sovereignty is impaired simply when the federal government directs State action. Rather, the challenged Act must seek to control or influence the manner in which the State regulates private parties. That requirement is satisfied here for the reason that IGRA causes State officials to deprive private parties, i.e. State citizens, of the right to expect that the State will act as a "shield of protection" for rights contained in the people's Bill of Rights.

The facts in *Reno* are so very different than the instant case. There, the Court upheld a federal statute which conflicted with State law. It did not command State officials to participate in an activity that was violative of the State's Constitution and the people's Bill of Rights. The federal law did not impose affirmative and substantial burdens on the State, without any participation by the federal government, in order to accomplish the federal purpose of the Act.

To require the State to take action in order to ensure the success of a federal regulatory program, in the face of such action being violative of the constitutional duty the State owes its citizens, is to sanction Congress' use of the State as a mere agent serving the interests of the federal government to the detriment of the interests of State citizens. *Alden v. Maine*, 527 U.S. 706 (1999). It is particularly egregious when the federal government in effect "walks away" having no role in advancing the goal it seeks.

There are ample other means to accomplish the goal of the Act without any coercion of the State. That is, provide for gaming throughout the country pursuant to Congress' plenary power. It is, we submit, no answer to argue that the Act should

be sustained since Congress has bestowed more participation upon the State than the State would ordinarily have were Congress to directly use its plenary power. For now the Court's task is to enforce constitutional limits on Congressional power presented by this Act.

The means chosen by Congress, i.e. compacting, indelibly blurs the matter of accountability. State citizens will see their government as the one entity acting to advance conduct prohibited by their Constitution and Bill of Rights. *New York*, 505 U.S. at 168-169.

The Act is not one where the federal government, through the Supremacy Clause, in effect strikes down a State statute or so occupies a field that the State is barred from entry unless the federal government and the State acting voluntarily enters into a cooperative arrangement. However, IGRA gives the State no choice but to accept obligations and burdens to satisfy Congress' express goal while, as earlier noted, the resources of the federal government are directed elsewhere.[2]

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[2] Consideration must be given to whether the compacting provisions of the Act, applicable only to Class III gaming involving large-scale commercial casino operations, may be severable from the remainder of IGRA. It seems clear that the Legislature would not have enacted the Act without inclusion of the challenged compacting provisions. That being so, the remainder of Act should not survive. However, this Court has held: "in the absence of a severability clause, . . . Congress' silence is just that – silence does not raise a

Were IGRA held to be within Congress' authority, the State court decision has presented this Court with the issue of whether the Act, *as a matter of federal law*, expands the powers of the legislature and governor beyond the limitations each has under the State Constitution, so that these two branches could bind the State to a compact.

Were the Act's compacting provisions held to be constitutional, this Court should reach the issue of the intended scope of the "rule" it enunciated in *Cabazon*. The lower courts uniformly, and erroneously, hold that IGRA codified the "rule" and apply it to Class III gaming despite IGRA's express legislative history that the "rule" was only to be applied, in modified form, to Class II gaming.

B. Facts and Procedural History

IGRA was enacted in 1988 for the express purpose of making tribes economically self-sufficient through Class III gaming which requires a Tribal-State gaming compact. 25 U.S.C. 2702(1).

Pursuant to IGRA, simple Class II gaming (e.g. bingo) and commercialized Class III casino gaming activities will be lawful on Indian lands if they are "located in a State that permits such gaming for any purpose by any person, organization, or entity . . ." 25 U.S.C. 2710(d)(1)(B), (C).[3]

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presumption against severability." *Alaska Airlines v. Brock*, 480 U.S. 678 (1987).

[3] Class I and II gaming *do not* require a compact.

However, a Tribal-State compact is required to permit Class III gaming in order that a State may weigh its own interests:

> States are not required to forgo any State governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact.

1988 U.S.C.C.A.N. 3071 at 3083-84.

* * *

The State legislation out of which this controversy arose was passed in the late evening hours – an 81 page bill – without notice to the people or debate.

Chapter 383 of the New York State Laws of 2001 provides in pertinent part, that the governor is authorized to negotiate and enter into compacts with Indian tribes to provide for commercialized Class III casino gaming on Indian lands.

* * *

On July 17, 2003 the New York State Supreme Court, Albany County held that the portion of chapter 383 which authorized the governor and the legislature to compact with Indians for commercialized Class III casino gaming on Indian lands was constitutional (Part B). *See* Appendix C (A143).

On July 7, 2004 the New York State Supreme Court, Appellate Division, Third Department rendered its opinion holding same. *See* Appendix B (A79).

On May 3, 2005 the New York Court of Appeals (*see* Appendix A (A1)) relying on what it believed to be the mandate of IGRA, upheld the authority of the New York State legislature to authorize the governor to negotiate and compact with Indians to permit commercialized Class III casino gaming on Indian lands.[4]

The court held that even if the governor and legislature lacked the power under the State Constitution to expand gaming, IGRA enabled the governor and legislature, as a matter of federal law, to bind the State to the terms of a compact. [*However*, IGRA does not vest the governor and legislature with powers in excess of those they possess under State law. In short, IGRA does not enlarge the power of the governor and the legislature. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650, *rehearing en banc denied*, 2004 U.S. App. LEXIS (7th Cir. 2004), *cert. denied*, 125 S. Ct. 878 (2005); *State v. Johnson*, 904 P.2d 11 (1995) ("We do not agree that Congress, in enacting IGRA, sought to invest [state officials] with powers in excess of those that they possess under state law. Moreover, we are confident that the United States Supreme Court would reject any such attempt by Congress to enlarge state power"). The net effect of the court's holding is that Congress is able to require a State legislature to pass laws it ordinarily has no authority to enact under the State Constitution and Bill of Rights.]

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[4] The court mistakenly held that tribes are sovereigns. They are not; they have attributes of sovereignty. *Worcester v. Georgia*, 31 U.S. 515 (1832).

The State court relied on the doctrine of preemption. As a result, the court mistakenly gave no weight or relevance to the State's Constitution or the people's Bill of Rights. [*However*, preemption is not relevant for this is a case involving conscription of the State requiring it to act in violation of its Supreme Law in order to satisfy the federal government's goal as opposed to barring the State from entering into a field, striking a State law, or entering into a voluntary cooperative agreement. Preemption does not support requiring a State to compact with another State or quasi-sovereign entity. An invalid law neither invokes the Supremacy Clause nor preemption. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).]

The court further ruled State sovereignty was not impaired because the State had a "choice" as to whether or not to enter the compacting process. [*However*, as earlier noted, there is no "choice" given the threat of court action and the Secretary's power, in consultation only with the tribe, to set procedures binding on the State for commercialized Class III casino gaming.]

The court also held the regulatory/prohibitory rule of *Cabazon* applied to Class III gaming. This holding was premised on the court's misinterpretation of *Cabazon* and the intended meaning of Congress' use of identical language in a *single* portion of the Class II and III gaming provisions.[5] The court reasoned that by using identical language in one portion

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[5] Gaming will be lawful if "located in a State that permits such gaming for any purpose by any person, organization, or entity . . ." 25 U.S.C. 2710(b)(1)(A) [Class II] and 25 U.S.C. 2710(d)(1)(B) [Class III].

of these provisions, Congress must have meant that *Cabazon* was to apply to both Class II and III gaming. [*However*, IGRA's legislative history leaves no room for any dispute that *Cabazon*, in modified form, was to apply solely to Class II gaming. The court applied an incorrect canon of construction to arrive at a result not intended by Congress. The consequence of the court's misapplication of *Cabazon* to Class III gaming wrongly enables courts to utilize the Class II regulatory/prohibitory rule and erroneously hold that if a State permits very limited charitable Class III gaming [with no prize to exceed $250 and total prizes not to exceed $1000] this justifies Indians conducting commercialized billion dollar Class III gaming. This misinterpretation is more fully discussed in Reason III *infra*.]

Finally, the court noted the extent of commercialized gaming in New York. However, the court failed to give any weight to the fact that each and every form of gaming in the State was approved by a vote of the people as a result of a constitutional amendment. It further failed to consider that commercialized casino gaming has always been banned in this State.

REASONS FOR GRANTING THE PETITION

REASON I

CONGRESS EXCEEDED ITS POWER WHEN – TO PROMOTE TRIBAL ECONOMIC INTERESTS – IT CHOSE IGRA'S COMPACTING PROCESS, WHICH REQUIRES STATES ALONE TO BEAR SUBSTANTIAL EXPENSE AND BURDENS IN THE NEGOTIATION OF AND ENTRY INTO A TRIBAL-STATE GAMING COMPACT THAT WOULD PERMIT TRIBES TO CONDUCT MEGA-BILLION DOLLAR COMMERCIALIZED CASINO GAMING - *DESPITE SUCH ACTION BY THE STATE AND ITS OFFICIALS BEING IN DEFIANCE OF THE CENTURY OLD PROHIBITION ON SUCH GAMING CONTAINED IN THE PEOPLE'S CONSTITUTION AND THEIR BILL OF RIGHTS*

The guiding principles are set out in the opening paragraphs of the Introduction.

The basic and fundamental rights of individuals are enshrined in the Federal as well as the State Constitutions, particularly in each government's Bill of Rights.

In describing the importance of a Bill of Rights it has been written:

> [t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943) (Jackson, J.).

To the same effect, James Madison, who had the primary responsibility for drafting the Bill of Rights, wrote:

> provisions in a Bill of Rights will "be an impenetrable bulwark against every assumption of power by the Legislature or Executive," with courts as the guardian of those Rights.

Writings of James Madison, (Hunt. Ed., Vol. 5).

IGRA directly and adversely intrudes upon the relationship between the State and its citizens. It requires State government to further and facilitate conduct banned by the people's Bill of Rights. This kind of disruption Congress may not visit on the State government's relationship with its citizens. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

* * *

The specific burdens faced by the State follow.

IGRA provides that when a tribe serves a demand upon the State to negotiate for a compact to permit the conduct of

mega-billion dollar Class III casino gaming, the State has no option, no choice, but is required to negotiate with the tribe for a Tribal-State compact.

Numerous subjects must be discussed and, if possible, agreed to, such as the applicability of State civil and criminal laws at casinos, taxation of gambling revenue, remedies for breach of contract, and the regulation of the tribe as well as other terms necessary for the licensing of such activity. This necessitates the State having to commit personnel for as much time as necessary up to 180 days.

A critical burden faced by the State is court action. That is, the Act empowers the judiciary to override the decision of the State. This is particularly destructive of the principles of federalism for the State is subject to being coerced into compacting pursuant to the mandate of a court order. But where is the federal government? Should it not have some responsibility, shoulder any burden, to further the federal goal?

If the State chooses not to compact, or no compact is agreed to, and the State does not invoke the Eleventh Amendment, an action may be brought by the tribe against the State testing the State's good-faith in not agreeing to a compact. The State has the ultimate burden of showing good-faith. If the State fails to meet its burden it will be ordered[6] to conclude a compact within 60 days. If a compact is not concluded, the Court will appoint a mediator. The tribe and State are then

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[6] *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1030-31 (2d Cir. 1990), *cert. denied* 499 U.S. 975 (1991)

required to meet with the mediator in a further attempt to agree to a compact.

Failing to agree to a compact, the Act as earlier noted, in a distinctly unfair manner, requires the Secretary, in consultation *only* with the tribe [with the State not being present] to prescribe procedures for the conduct of Class III casino gaming which will be binding on the State. 25 U.S.C. 2710(d)(7)(B)(vii). If, however, the State decides to avoid court action by invoking the Eleventh Amendment, the aforenoted procedures involving the Secretary will nonetheless be triggered.

At every stage the Act gives the State no real "choice" but to act in furtherance of the federal goal.

If the State agrees to a compact, then in States like New York there must be empowering legislation following submissions to more than 200 legislators, with debate, study, and hearings unless, as in this case, all this is cut off by the governor's "message of necessity" warranting the claimed need for quick approval. *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003).

The role of the State once a compact is entered into is ongoing regulation.

Senator Inouye, from the Senate Select Committee, stated:

> the Select Committee on Indian Affairs [did not] view as meritorious any suggestions for the establishment of a Federal regulatory

> mechanism to duplicate *what already exists at the State level*.

134 Cong. Rec. S12,650 (daily ed. Sept. 15, 1998) (emphasis added).

How offensive this must be to the people given the State's longstanding policy:

> [C]ommercialized Las Vegas style gambling . . . is the antithesis of the highly restricted and "rigidly regulated" (N.Y. Const., art. I, § 9[2]) forms of gambling permitted by the N.Y. Constitution . . . and New York's established public policy disfavoring gambling.

Saratoga County Chamber of Commerce v. Pataki, 293 A.D. 2d 20, 24 (3d Dep't 2002) *aff'd as modified* 100 N.Y.2d 801 (2003).

The dissenting Opinion of Judge George Bundy Smith in the instant case, as well as his concurring and dissenting Opinion in *Saratoga County Chamber of Commerce v. Pataki* (*supra* [Appendix E (A156)]), fully and scholarly trace the history of New York's constitutional law, criminal law, and policy towards commercialized gaming, in the absence of an amendment.

While the State court is correct that New York does permit some commercialized gaming (but never casino gaming involving roulette, slot machines, and the like), such gaming as lotteries and horse racing, as well as charitable gaming, were each authorized by the people by effecting a constitutional

amendment. Repeated constitutional conventions have revisited the issue of commercial gaming and each overwhelmingly decided that the general ban of Article I, § 9 of the Bill of Rights should stand.

It cannot be argued that IGRA should be sustained through any doctrine of "cooperative federalism," *Hodel v. Virginia Surface Mining and Reclamation Association,* 452 U.S. 264, 288 (1991). Cooperativeness does not apply where the State is given no option, but rather is compelled to act to accomplish a goal of providing for gaming in violation of the people's fundamental rights. *See Lee v. Weisman*, 505 U.S. 577 (1991) ("even subtle pressure diminishes the right . . . to chose voluntarily. . .").

And, even were State government to consent, as is the case here, it would not save Congress acting beyond its power nor could it waive the fundamental rights contained in the people's Bill of Rights. *New York,* 505 U.S. at 181.

* * *

The State Constitution was framed with care and ratified by the people in order to protect their fundamental rights. The Preamble makes that clear:

> WE, THE PEOPLE of the State of New York, grateful to Almighty God for our freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION

The Act is not a law "proper for carrying into execution" delegated powers or within the Necessary and Proper Clause.

It cannot be sustained by reference to the Supremacy Clause which only makes supreme laws of the United States which are made pursuant to the Constitution (U.S. Const. Art. VI, cl. 2).

REASON II

IGRA DID NOT EXPAND THE POWERS OF THE EXECUTIVE AND LEGISLATIVE BRANCHES OF STATE GOVERNMENT BEYOND THEIR ENUMERATED POWERS, SO THAT THESE BRANCHES OF GOVERNMENT COULD ENTER INTO A TRIBAL-STATE CASINO GAMING COMPACT - *DESPITE THEIR ACTION BEING IN DEFIANCE OF THE POWERS THEY POSSESS UNDER THE STATE CONSTITUTION*

The State court in giving no weight to the State Constitution or Bill of Rights obviously looked to IGRA as requiring a casino gaming compact. Likewise, it clearly ruled the governor and legislature had the authority to negotiate and agree to such a compact. Reliance for the expansion of the powers of the governor and legislature had to be founded on the court's belief that federal law replaced State constitutional constraints. However, under State law only through a constitutional amendment involving a vote of the people can the constitutional ban on gaming be modified or a casino gaming compact be authorized.

There is no support for the way in which the State court viewed IGRA as so enlarging the power of two branches of government, that they could act contrary to the right of the

people to participate as provided for in the State Constitution. The ruling sanctioned by the State court is inconsistent with core principles of federalism. *Gregory v. Ashcroft*, 501 U.S. at 460; *New York v. United States*, 504 U.S. at 176.

In this regard we note that in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650, *rehearing en banc denied*, 2004 U.S. App. LEXIS (7th Cir. 2004) *cert. denied*, 125 S. Ct. 878 (2005) the court ruled that IGRA does not vest the Governor with the power to approve a gaming operation that was "outside the strictures of the gaming policy that Wisconsin had already established through legislation and amendments to the Wisconsin Constitution." *Id.* at 664.

It is essential that this Court, correct any misinterpretation of a federal statute, particularly where it materially disrupts the relationship between the State government and its citizens. There is nothing in the legislative history to support the view that the provisions of IGRA were meant to expand powers beyond the limitations imposed by the people in ratifying their Constitution. Rather, it has been held that left to State law (the State Constitution being the supreme law of the State) is the decision of how and who could bind the State. *Seminole Tribe v. Florida,* 517 U.S. 44 (1996); *Saratoga Chamber of Commerce v. Pataki,* 100 N.Y. 2d 801 (2003); *Lac Courte Oreilles*, *supra; State v. Johnson*, 904 P.2d 11 (1995) ("We do not agree that Congress, in enacting IGRA, sought to invest [state officials] with powers in excess of those that they possess under state law. Moreover, we are confident that the United States Supreme Court would reject any such attempt by Congress to enlarge state power"). So sure were the legislature and the executive branches belief that the Act empowered them

beyond the State Constitution, that the compacting authority was passed without notice to the people.

Assigning no bad faith to the government, the way the State legislature authorized the governor to act evidences the belief, supported by the State court, that IGRA mandates action without regard to limits placed on their power by the Bill of Rights. This is simply not the case.

The State court misinterpreted the meaning and intention of IGRA.

REASON III

COURTS MISPERCEIVE THE QUALIFIED NON-BRIGHT-LINE RULE OF *CALIFORNIA v. CABAZON*, 480 U.S. 202 (1987) WHEN THEY HOLD THAT BECAUSE A STATE PERMITS VERY LIMITED CHARITABLE CLASS III GAMING IT MUST, UNDER IGRA, ALLOW TRIBES TO CONDUCT LARGE-SCALE COMMERCIALIZED CLASS III CASINO GAMING - *DESPITE IGRA'S EXPRESS LEGISLATIVE HISTORY THAT CABAZON WAS ONLY TO BE APPLIED TO CLASS II GAMING AND CHARITABLE GAMING OF ANY SORT APPLIES ONLY TO JUSTIFY CLASS II GAMING*

This assumes *arguendo* the constitutionality of IGRA.

This point deals with 1) whether the *Cabazon* "rule," considering IGRA's legislative history, supports the view taken

by courts that it was meant to apply to Class III gaming; and, 2) whether limited charitable Class III gaming was intended to give Indians the right to conduct mega-billion dollar commercialized casino gaming.

IGRA's legislative history is crystal clear: that *Cabazon*, in modified form, is to be applied only to Class II gaming, the Class of gaming from which the "rule" emerged. Contrary to the uniform decisions of courts that the rule is meant to be applied to Class III gaming, the Senate Select Committee's report is categorical that *Cabazon* was only to apply to Class II gaming:

> [f]inally, the Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether *CLASS II* games are allowed in certain States. This distinction has been discussed by Federal courts many times, most recently and notably by the Supreme Court in Cabazon. Under Public Law 83-280, the prohibitory/regulatory distinction is used to determine the extent to which State laws apply through the assertion of State court jurisdiction in Indian lands in Public law 280 States. The Committee wishes to make clear that, under S. 555 [IGRA], application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83-280. Here, the courts will consider the distinction between a

> State's civil and criminal laws to determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities. The Committee does not intend for S. 555 to be used in anyway to subject Indian tribes or their members who engage *in CLASS II* games to criminal jurisdiction of States in which criminal laws prohibit *CLASS II* games.

1988 U.S.C.C.A.N. 3071 [emphasis added].

Nonetheless, since IGRA's Class II (25 U.S.C. 2710(b)(1)(A)) and Class III (25 U.S.C. 2710 (d)(1)(B)) gaming provisions had one identically worded subdivision – i.e., gaming is lawful if located in a State that permits such gaming for any purpose by any person organization or entity – courts mistakenly opine Congress must have intended *Cabazon's* "rule" to apply to both Classes. This approach conflicts with the unambiguous statements of the Congress.

There is no claim that the Select Committee's report is insufficient. And, as can be seen, Congress clearly recognized the serious concerns a State has with respect to Class III gaming as compared with Class II gaming.

Courts, to reach the conclusion that IGRA's Class II as well as Class III provisions codify the "rule," apply an inappropriate canon of construction, i.e., identical words used in different parts of the same act should be given the same meaning. *Dalton v. Pataki*, 2005 WL 1017641 (N.Y. May 3, 2005); *Mashantucket Pequot Tribe v. State of Connecticut*, 913 F.2d 1024, 1030-31 (2d Cir. 1990), *cert. denied* 499 U.S. 975 (1991); *Lac du Flambeau Indians v. State of Wisconsin*, 770 F.

Supp 480 (W.D. Wis. 1991), *appeal dismissed*, 957 F.2d 515 (7th Cir. 1992).

The above canon overrides the evident intent of the lawmakers. *United States v. Gaskin*, 320 U.S. 527, 530 (1944); *United States v. Raynor*, 302 U.S. 540, 552 (1938); *United States v. Giles*, 300 U.S. 41 (1937). Given Congress' clearly expressed view, the appropriate canon is the one expressed by this Court in *Atlantic Cleaners & Dyers Inc. v. United States*, 286 U.S. 427 (1932) and its progeny.

In *Atlantic Cleaners and Dyers*, this Court held that it is not unusual for the same word to be used in one statute with different meanings. *Id.* There is no rule of statutory construction which precludes courts from adopting the meaning which the legislature intended.

As noted, Congress never intended to require the State to afford the same treatment to Class II gaming it does to Class III gaming. It is one thing to play bingo in a Tribal social hall, but quite another matter to be in a resort with entities such as the Hilton Hotel chain conducting mega-billion dollar commercialized Class III casino gaming available to no one else in the state.

Given this, the appropriate canon to be applied was set forth in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004), where this Court stated that the

> presumption [that identical words used in different parts of the same act are intended to have the same meaning] is not rigid and readily yields whenever there is such variation in the

> connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.

Id. at 595; *see also United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001).

Further:

> identical words appearing more than once in the same act, and even in the same section, may be construed differently if it appears they were used in different places with different intent.

Vancoster v. Sullivan, 920 F.2d 1441, 1448 (9th Cir. 1990).

The New York Court of Appeals, as well as *Mashantucket* (and others cited above), ignore the rule that requires a court to examine legislative intent before giving the interpretation each gave to the meaning of the "identity of language" in the Class II and III gaming provisions.

* * *

As to the claim that very limited charitable Class III gaming triggers the right of Indians to conduct large-scale commercialized Class III casino gaming on Tribal lands, this view is not supported by any reading of *Cabazon* or IGRA's legislative history.

Under the flawed reasoning of lower courts, the only way it would be possible for a State to avoid commercialized

Class III casino Tribal gaming is to prejudice charities by prohibiting them from conducting charitable Class III gaming. Congress certainly did not envisage this.

As to charitable gaming the Senate report is to the following effect: [1988 U.S.C.C.A.N. 3071, 3081] (emphasis added).

> Class II. – –
>
> . . . The phrase "for any purpose by any person, organization or entity" makes no distinction between State laws that allow *Class II* gaming for charitable, commercial, or governmental purpose, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming. . .
>
> * * *
>
> Class III. – – [no mention of charitable gaming as applicable or being a predicate for this form of gaming.]

It has been explained: "Congress never intended for there to be high-stakes casinos on Indian land simply because a state allows charities to have 'Las Vegas Nights.' . . . Few [congressmen] realized that dozens of states allowed low-stakes casinos and other gambling for charities when they voted for the Act." Rose, Nelson, *Legal Gambling's History Triumph at the Polls*, Gaming Indus. Litig. Rep. Dec. 1996 at 15. As reported, one Senator stated: "I've watched Indian gaming spread

haphazardly into more than two dozen states across the country. This rapid proliferation has left many uncertainties in its trail. Court decisions have opened holes that violate the intent of the act." Connor, Matt, *Nevada, N.J. Legislators Sponsor Indian Gaming Bills*, Int'l Gaming & Wagering Bus., July15-Aug. 14, 1993 at 1, 44 (internal quotations omitted).

It is yet another appropriate canon of statutory construction that even the literal words of a statute will not be so construed so as to reach an absurd result. Rejected must be a reading of statutes that would "lead to bizarre results." *United States v. Brown*, 333 U.S. 18 (1948).

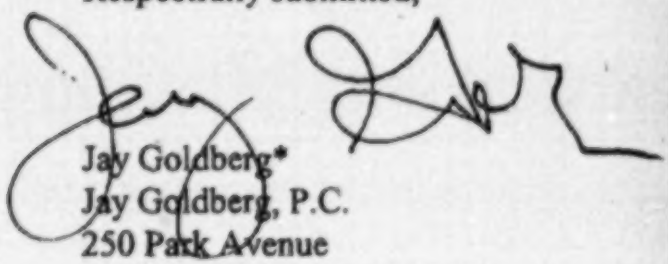
To read IGRA's "identity of language" in the way the State court did leads to this result: if in a house of worship five parishioners are permitted to engage in one charitable Las Vegas night, where no prize is to exceed $250 and prizes in total are not to exceed $1000 [this the limit in New York], then tribes, major gambling interests, and their coterie, would have an absolute right to conduct Class III gaming in commercialized casino complexes, built and operated by corporations such as intervenor Hilton Hotels – Park Place – earning mega-billions of dollars.

In summary, it is submitted, that IGRA was not intended to codify *Cabazon* as to both Class II and Class III gaming. And, charitable gaming was not intended to confer the right to conduct large-scale commercialized casino gaming. It is this misinterpretation which allows for this kind of gaming and that offends the State Constitution and people's Bill of Rights.

CONCLUSION

Accordingly, for all the foregoing reasons, as well as those presented by co-petitioners Joseph Dalton, *et al.*, petitioner Mrs. Lee Karr respectfully urges this Court to grant this Petition for a Writ of Certiorari.

Respectfully submitted,



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APPENDIX A

Appendix A – Judgment And Decision Of The New York State Court Of Appeals Decided May 3, 2005 And Entered May 12, 2005

Court of Appeals of New York.
Joseph DALTON et al., Appellants-Respondents,
v.
George PATAKI, as Governor of the State of New York, et al., Respondents-
Appellants,
et al., Respondents.
(Action No. 1)

Lee Karr, Appellant-Respondent,
v.
George Pataki, as Governor of the State of New York, et al., Respondents-
Appellants,
et al., Respondents.
(Action No. 2)

May 3, 2005.

CIPARICK, J.:

In 2003, we addressed whether the Governor had the authority to enter into compacts with Indian tribes pursuant to the federal Indian Gaming Regulatory Act of 1988 (IGRA) 25 USC § § 2701-2721; 18 USC § § 1166-1168) allowing casino gaming on Indian lands within the State (*see Saratoga County Chamber of Commerce, Inc. v. Pataki,* 100 N.Y.2d 801 [2003]). We determined that the Governor's actions in unilaterally negotiating and entering into such tribal-state compacts violated

separation of powers principles because such actions involved policy decisions within the power of the Legislature. Since the compacts were invalidated on this ground, we did not reach the questions whether casino gaming permitted by such tribal-state compacts violated the commercial gambling prohibitions of article I, § 9 of the New York State Constitution and whether IGRA preempts in this area. Those issues are now squarely presented for our review. Also presented is the constitutional validity of video lottery gaming and New York's participation in the multi-state Mega Millions lottery.

Chapter 383 of the Laws of 2001 was introduced in the Senate and the Assembly on the evening of October 24, 2001, and the early morning of October 25, 2001. The 81-page bill contained a wide range of provisions aimed, in part, at countering the anticipated negative economic effects of the terrorist attacks of September 11th and at generating revenue. The Governor submitted a message of necessity, certifying the need for an immediate vote on the bill, which had not been on the legislators' desks in final form for the required three calendar days (*see* N.Y. Const, art III, § 14). The Legislature enacted the bill immediately and the Governor signed it into law shortly thereafter.

The provisions at issue on this appeal are Parts B, C and D of Chapter 383. Adding a new Executive Law § 12, Part B authorized the Governor to enter into "a tribal-state compact with the Seneca Nation of Indians pursuant to the [federal] Indian Gaming Regulatory Act of 1988 ... consistent with a memorandum of understanding between the [parties]" (L 2001, ch 383, Part B, § 2). The memorandum of understanding permitted the parties to negotiate a compact to allow Class III gaming in up to three casinos. [FN1] The compact would be

deemed adopted by the Legislature when the Governor certified that the agreement provided for, among other things, reasonable access to the gaming facilities by labor unions, a satisfactory system for civil recovery and adequate liability insurance. Part B also authorized the Governor to enter into tribal-state compacts with unnamed tribes to allow up to three additional Class III gaming facilities in Ulster and Sullivan Counties. Those compacts would likewise be deemed adopted by the Legislature when the Governor certified they met the requisite labor union, civil recovery and liability insurance requirements.

> FN1. Class III gaming is the most heavily regulated type of gaming under IGRA. The federal regulations give examples of Class III gaming "including but not limited to [a]ny house banking game" such as baccarat or blackjack, casino games including roulette or keno, slot machines, sports betting and lotteries (*see* 25 CFR § 502.4).

Part C authorized the use of video lottery terminals (VLTs)--under Tax Law § 1617-a--at several racetracks, including Aqueduct, Monticello, Yonkers, Finger Lakes and Vernon Downs (*see* L 2001, ch 383, Part C, § 1). The bill also amended Tax Law § 1612 to include a revenue distribution scheme for the VLT proceeds (*see* L 2001, ch 383, Part C, § 2). Between 12 and 25 percent of the total revenue was designated a vendor's fee. The legislation provided that a portion of the vendor's fee must be reinvested in the racing industry by applying it to enhancing purses and to the appropriate breeding fund. Finally, Part D amended Tax Law § § 1604 and 1617 to authorize the State's participation in a multi-jurisdictional lottery (*see* L 2001, ch 383, Part D, § § 1, 3).

Plaintiffs are a group of citizen taxpayers, state legislators and not-for-profit organizations "opposed to the spread of gambling." They commenced this action in January 2002. Plaintiffs moved for summary judgment declaring Parts B, C and D of Chapter 383 unconstitutional. Defendants and intervenor-defendant (Park Place) each cross-moved for summary judgment dismissing the complaint. Supreme Court granted the cross motions, denied plaintiffs' motion for summary judgment and declared the challenged portions of Chapter 383 of the Laws of 2001 constitutional.

The Appellate Division modified, in a comprehensive opinion, by reversing the portion of Supreme Court's order that declared Part C constitutional, declared Part C unconstitutional and, as so modified, affirmed (*see* 11 AD3d 62 [2004]). The court determined that the Governor's message of necessity was sufficient to meet the requirements of article III, § 14 of the State Constitution. It further found that since the State allows the type of gaming at issue, with certain limitations, the gaming was "properly the subject of a tribal-state compact and part B" was constitutional (11 AD3d at 83). Similarly, the Appellate Division found that Part D, authorizing the multi-state lottery, was constitutional--finding that the State "retains sufficient supervision over the multi-state lottery ... to satisfy the constitutional requirement that a lottery be 'operated by the state' " (11 AD3d at 105 [citations omitted]). The court also determined that the net proceeds from the multi-state lottery were properly dedicated to education in the state (*see* 11 AD3d at 106).

As to Part C--authorizing the operation of Video Lottery Terminals (VLTs)--the Appellate Division concluded that the VLTs were components of lotteries rather than slot machines

and, as such, were constitutionally permitted (*see* 11 AD3d at 94). However, the court determined that the portion of the legislation directing that certain percentages of the vendor fees be reinvested for enhancing purses and to an appropriate breeding fund did not meet the constitutional requirement that lottery proceeds be dedicated exclusively to the support of education within the state (*see* 11 AD3d at 99). The Appellate Division found the revenue distribution defect was not severable because severance would result in "either an inflated vendor fee or no fee at all" (11 AD3d at 102). Thus, the Appellate Division declared Part C unconstitutional in full. Plaintiffs now appeal, and defendants cross-appeal, as of right pursuant to CPLR 5601(b)(1). We modify the Appellate Division and declare that Parts B, C and D of Chapter 383 of the Laws of 2001 are in all respects constitutional.

New York State Constitution

While our State Constitution generally prohibits gambling, this broad prohibition is subject to limited exceptions. For example, the Constitution provides that

> "no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state"
>
> (N.Y. Const, art I, § 9[1])

The Constitution further allows individual municipalities to authorize, by vote at a general or special election, certain "games of chance"--such as bingo, lotto or other types of games where a winner is determined on the basis of a winning number, color or symbol (*see* N.Y. Const, art I, § 9[2]). These types of games are further restricted by the Constitution, which requires that only certain religious, charitable or non-profit organizations will be authorized to conduct these types of games (*see* N.Y. Const, art I, § 9[2] [1]). In addition, only "bona fide" members of the particular organization are permitted to "participate in the management or operation of such game" and are not permitted to receive any remuneration for their participation (*see* N.Y. Const, art I, § 9, [2][3]-[4]). Further, the entire net proceeds from these games must be dedicated to the lawful purposes of the organization (*see* N.Y. Const, art I, § 9[2][2]). The Constitution also restricts the prizes that can be awarded-allowing no more than $250 for a single prize and a maximum total of $1,000 for "any series of prizes on one occasion" (N.Y. Const, art I, § 9 [2]).

Plaintiffs argue that because the State Constitution prohibits commercial gambling, subject to specifically stated exceptions, the Legislature may not authorize the Governor to enter into tribal-state compacts, nor may it allow video lottery terminals or permit the State to participate in a multi-state lottery.

Legislative enactments are entitled to "a strong presumption of constitutionality" (*see Schulz v. State,* 84 N.Y.2d 231, 241 [1994]). "While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt' " (*LaValle v. Hayden*, 98 N.Y.2d 155, 161 [2002], quoting *People v. Tichenor*, 89 N.Y.2d 769, 773 [1997]). With

respect to Parts C and D of the legislation, plaintiffs have failed to rebut that strong presumption. However, the inquiry is different as to Part B, given that the State Constitution expressly prohibits commercial gambling. For Part B, we must instead determine whether IGRA preempts this constitutional proscription because the State allows Class III gaming for certain charitable and other purposes.

Background of IGRA

Necessary to our determination is an analysis of the federal Indian Gaming Regulatory Act of 1988 (IGRA) (25 USC § § 2701-2721; 18 USC § § 1166-1168). Contrary to plaintiffs' assertion, IGRA has preempted the field in the area of Indian gaming but permits states to negotiate with tribes to regulate gaming. IGRA was enacted, in part, to promote the self-sufficiency and economic development of Indian tribes (*see* 25 USC § § 2701[4], 2702[1]). Congress determined that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity" (25 USC § 2701[5]).

IGRA separates the types of gaming into three classes--class I, II and III-- each subject to a different degree of regulation. Class I gaming consists of "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations" (25 USC § 2703[6]; *see also* 25 CFR § 502.2). This type of gaming is solely within the jurisdiction of the tribes and is not subject to IGRA (*see* 25 USC § 2710[a][1]). Class II gaming includes bingo, lotto and certain types of card games--specifically excluding banking card games such as

baccarat (*see* 25 USC § 2703[7][A], [B]; 25 CFR § 502.3[a]-[c]). Class II activity is permissible on Indian land, [FN2] subject to the tribe's jurisdiction, if located in a state that otherwise permits such gaming for any purpose and if the Indian tribe passes a resolution that is approved by the Chair of the National Indian Gaming Commission (*see* 25 USC § 2710[b] [1]).

> FN2. Indian lands are defined as "all lands within the limits of any Indian reservation, and any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power" (25 USC § 2703[4]).

Class III gaming includes all remaining types of gaming not within Class I or II (*see* 25 USC § 2703[8]). This type of gaming is the most highly regulated. In addition to the requirements for Class II gaming--a Chair-approved tribal ordinance and location in a state that otherwise permits such gaming--the Class III gaming must also be conducted according to a valid tribal-state compact (*see* 25 USC § 2710[d][1][C]). A tribe seeking to conduct Class III gaming on Indian land must request that the state negotiate with the tribe in an attempt to develop a tribal-state compact to regulate gaming activity (*see* 25 USC § 2710[d][3][A]). "Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact" (25 USC § 2710[d][3][A]). Any such compact is subject to the approval of the Secretary of the Interior (*see* 25 USC § 2710[d][3] [B]).

Prior to the enactment of IGRA, the United States Supreme Court addressed the applicability of state law to Indian gaming within the State of California (see California v. Cabazon Band of Mission Indians, 480 U.S. 202 [1987]). *Cabazon* dealt with a federal statute giving California, along with certain other states, criminal and limited civil jurisdiction over Indian land within the state. California sought to enforce a penal statute prohibiting bingo-- unless conducted by certain charitable organizations--against two Indian tribes. The Court observed "that Indian tribes retain 'attributes of sovereignty over both their members and their territory' and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States,' " (Cabazon, 480 U.S. at 207 [citations omitted]). However, the Court also noted that, if authorized by Congress, state laws would be applicable to tribal lands.

In determining whether the law at issue could be enforced on Indian land, the Supreme Court recognized a distinction between whether the law was prohibitory or regulatory in nature (*see Cabazon,* 480 U.S. at 209). If the purpose of the law is to prohibit specific conduct, it is considered prohibitory and can be enforced on Indian land. If, on the other hand, the law allows the conduct "subject to regulation," the law is regulatory and not enforceable on Indian land (*see Cabazon,* 480 U.S. at 209). "The shorthand test is whether the conduct at issue violates the State's public policy" (*Cabazon,* 480 U.S. at 209). Because the State allowed "a substantial amount of gambling activity, including bingo," the Court determined that the statute at issue was regulatory rather than prohibitory (*see Cabazon,* 480 U.S. at 211). The Court then went on to decide that California's interest in regulating bingo was insufficient as compared with the significant tribal interests.

Congress enacted IGRA in response to *Cabazon* (*see* S Rep No. 446, 100th Cong, 2d Sess, reprinted in 1988 U.S.Code Cong & Admin News 3071). The legislative history indicates that Congress intended that "unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities" (S Rep No. 446, 100th Cong, 2d Sess, at 5-6, reprinted in 1988 U.S.Code Cong & Admin News, at 3075). The tribal-state compact was designed as a way to reconcile tribal and state interests concerning class III gaming (*see* S Rep No. 446, 100th Cong, 2d Sess, at 6, reprinted in 1988 U.S.Code Cong & Admin News, at 3076).

Significantly, IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed" (S Rep No. 446, 100th Cong, 2d Sess, at 6, reprinted in 1988 U.S.Code Cong & Admin News, at 3076). Congress expected that the courts would apply the prohibitory/regulatory distinction when deciding whether gaming was permitted in a state, but in a different way than it was applied in *Cabazon* (*see* S Rep No. 446, 100th Cong, 2d Sess, at 6, reprinted in 1988 U.S.Code Cong & Admin News, at 3076). Specifically, rather than determining the degree to which a state's laws would apply to Indian lands, "the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities" (S Rep No. 446, 100th Cong, 2d Sess, at 6, reprinted in 1988 U.S.Code Cong & Admin News, at 3076). [FN3]

FN3. Although the portion of the legislative history specifically discussing the prohibitory/regulatory distinction was referring to Class II gaming, the applicable language in IGRA is virtually identical with respect to both Class II and Class III gaming (*see* 25 USC § 2710[b][1][A], [d] [1][B] [gaming is located in a state that otherwise "permits such gaming for any purpose by any person, organization or entity"]). There is no persuasive reason to treat the language in these two sections differently.

Following the enactment of IGRA, the Second Circuit addressed a similar situation to that presented here (*see Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 [2d Cir1990]). The Court determined that since Connecticut allowed certain Class III gaming--although it was highly restricted by statute--the State only regulated rather than prohibited this type of gaming (see Mashantucket, 913 F.2d at 1031-1032; *see also Northern Arapaho Tribe v. Wyoming*, 389 F3d 1308, 1312 [10th Cir2004]). [FN4]

FN4. The *Northern Arapaho* court noted that there is a conflict in the interpretation of IGRA--whether a state must negotiate with tribes concerning all forms of Class III gaming when it allows any type of Class III gaming, or whether it must only negotiate for the specific games permitted in the state (*see Northern Arapaho*, 389 F3d at 1310-1311). We do not address this issue as the plaintiffs have challenged the authority to enter into tribal-state compacts in general, rather than the authority to negotiate for particular games.

Tribal-State Compacts

Plaintiffs assert that although the Constitution allows for certain types of regulated gaming, it still completely prohibits *commercial* gaming. However, IGRA does not allow the State to consider the purpose behind the gaming. The language of the statute is clear that Class III gaming will be permitted when "located in a State that permits such gaming for *any* purpose by *any* person, organization, or entity" (25 USC § 2710[d][1][B] [emphasis added]). This language is intentionally broad and includes the limited gaming permitted by the New York State Constitution under the supervision and authority of the New York State Racing and Wagering Board (*see* General Municipal Law Article 9- A; 9 NYCRR § § 5600.1 *et seq.*). Through IGRA, Congress has preempted the states in this area. Since New York allows some forms of Class III gaming--for charitable purposes-such gaming may lawfully be conducted on Indian lands provided it is authorized by a tribal ordinance and is carried out pursuant to a tribal--state compact (*see* 25 USC § 2710[d][1]).

We likewise reject the argument that IGRA specifically provides that state laws prohibiting gambling will apply on Indian lands. Plaintiffs argue that 18 USC § 1166 allows for the constitutional ban on commercial gambling in article I, § 9 to be applied to Indian lands. That section states that "all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State" (18 USC § 1166[a]). However, the statute further provides that Class III gaming conducted pursuant to an approved tribal-state compact will not be considered "gambling" for purposes of that section (*see* 18 USC §

1166[c][2]). Thus, the State Constitutional prohibition against commercial gambling does not apply to Indian lands that are in compliance with IGRA and governed by a valid tribal-state compact.

Plaintiffs state that IGRA does not require states to enter into a tribal-state compact with Indian tribes, arguing that, as a matter of state sovereignty, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program" (*New York v. United States*, 505 U.S. 144, 188 [1992]). However, it may be to the State's benefit to do so. Through IGRA the states are granted a certain degree of authority over Class III gaming that they otherwise would not have due to the sovereignty of Indian nations (*see Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 [1996]; US Const, art I, § 8[3]). Thus, through the compacting process, IGRA confers a benefit on the state by allowing it to negotiate and to have some input into how Class III gaming will be conducted.

However, this authority is limited in that if the State either does not negotiate with a tribe or does not do so in good faith, the tribe may bring suit in Federal District Court (*see* 25 USC § 2710[d][7][B]). [FN5] If the court determines the State has not negotiated in good faith, the court will order the parties "to conclude such a compact within a 60-day period" (25 USC § 2710[d][7][B][iii]). If an agreement is not reached within that time, the court will appoint a mediator, who "shall select from the two proposed compacts [from the tribe and the state] the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court" (25 USC § 2710[d][7][B][iv]). If the State timely agrees, that compact will become the tribal-state compact (*see* 25 USC § 2710 [d][7][B][vi]). If the State does not agree (or

invokes sovereign immunity under the Eleventh Amendment to the United States Constitution), the Secretary of the Interior and the tribe will decide upon procedures for conducting Class III gaming (*see* 25 USC § 2710[d][7][B][vii]). Thus, if Class III gaming is permitted in the state for any purpose, including a strictly charitable purpose, it will be permitted on Indian land with or without the state's involvement. Given the consequence, obviously state involvement and regulation is to be favored.

> FN5. The G.B. Smith dissent suggests that the State was not required to negotiate in good faith as the Legislature was without authority to legislate in this area (*see* G.B. Smith dissenting op at 21). The constitutional ban on commercial gambling, according to this dissent, cannot be preempted by federal statute and can only be affected through a constitutional amendment. Certainly, if commercial gambling were to be extended to non-Indian lands, the dissent's proposition would be correct, but here we are dealing with the extension of commercial gambling to Indian lands, or lands held in trust by the United States Department of the Interior, to which Congress has seen fit to extend this benefit. This was done with the express intent of protecting Indian sovereignty. The Supremacy Clause of the United States Constitution specifically states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding" (U.S. Const, art VI, § 2). Federal law thus preempts even our constitutional ban. This is particularly true in the context of Indian matters, where a traditional exemption

> from state law will be "lifted only when Congress has made its intention to do so unmistakably clear" (*Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 [1985] [referring to Indian exemption from state taxes]).

In the alternative, plaintiffs argue that even if IGRA requires that Class III gaming be permitted on Indian lands, the same result is not required on land that is not Indian land. This argument is directed to the portion of Part B that authorizes the Governor to enter into tribal-state compacts allowing up to three casinos in Sullivan and Ulster Counties (*see* L 2001, ch 383, Part B, § 2[b]). With a few exceptions, gaming is generally prohibited on lands acquired by the Secretary of the Interior after the enactment of IGRA and held "in trust for the benefit of an Indian tribe" (25 USC § 2719[a]). Gaming, however, will be permitted when

> "the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination"
>
> (25 USC § 2719[b][1][A]).

Here, plaintiffs urge that both the constitutional provision and New York's public policy against commercial gambling prevent the Governor from agreeing that there would not be a detrimental effect on the communities at issue if casinos were located in those areas. The constitutional provision is relevant to the determination under 25 USC § 2710(d)(1)(B)

only--whether Class III gaming is permitted for any purpose and thus whether gaming should be allowed on Indian lands. Section 2719(b)(1)(A) does not call for the Governor to make a determination as to the legality of gaming. Rather, the determination whether gaming would be detrimental to the surrounding community entails an analysis of the potential negative consequences presented by the presence of the casinos, such as social or economic consequences. The Constitution plainly does not prevent the Governor from determining that there would be no detrimental effect on a particular community. [FN6]

FN6. We note that the United States Supreme Court recently addressed whether the Oneida Indian Nation was responsible for property taxes on certain property purchased on land that was once an Oneida reservation (see City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. ----, 125 S Ct 1478, 1482-1483 [2005]). The Court determined that the Oneidas could not "unilaterally reassert sovereign control and remove these parcels from the local tax rolls" and that the Tribe would have to follow the procedure set forth in 25 USC § 465, which "authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land 'shall be exempt from State and local taxation' " (*City of Sherrill,* 544 U.S. at ----, 125 S Ct at 1493). This holding is consistent with our interpretation of IGRA, allowing the Secretary and the Governor to authorize gaming on lands held in trust by the Secretary after determining such gaming would not be detrimental to the surrounding community (*see* 25 USC § 2719[b][1][A]).

Plaintiffs' last argument pertaining to Part B is that it was an improper delegation of legislative authority for the Legislature to authorize the Governor to execute tribal-state compacts in Sullivan and Ulster Counties (*see* L 2001, ch 383, Part B, § 2[b]). In *Saratoga,* we determined that the Governor did not have the authority to "unilaterally ... negotiate and execute tribal gaming compacts under IGRA" (100 N.Y.2d at 824). The Court observed that the issues that would be covered by a tribal-state compact involved policy decisions that were within the province of the Legislature (*see Saratoga,* 100 N.Y.2d at 823).

Here, the Legislature authorized the Governor to execute the tribal-state compacts and specified that such agreements would be "deemed ratified by the legislature upon the governor's certification" that the compacts contained certain provisions (L 2001, ch 383, Part B, § 2[b]). For example, the Legislature required that the compacts contain assurances that the tribe would provide access to labor unions, an adequate civil recovery system and sufficient liability insurance (*see* L 2001, ch 383, § 2[b]). The Legislature has thus made the necessary policy determinations as to what the tribal-state compacts must contain and has authorized the Governor to implement those policy determinations by executing the compacts to their specifications. This is a permissible delegation of authority. That the legislation does not specify the names of the tribes or where the casinos will be located does not change this determination (*see Bourquin v. Cuomo,* 85 N.Y.2d 781, 785 [1995] ["there need not be a specific and detailed legislative expression authorizing a particular executive act as long as 'the basic policy decisions underlying the regulations have been made and articulated by the Legislature' " (citation omitted)

Video Lottery Gaming

Plaintiffs next challenge the constitutionality of Part C of Chapter 383 of the Laws of 2001. That section authorized "the operation of video lottery gaming at Aqueduct, Monticello, Yonkers, Finger Lakes and Vernon Downs racetracks," and at certain other racetracks that are licensed pursuant to Article 3 of the Racing, Pari-Mutuel Wagering and Breeding Law and located within a county that has approved video lottery gaming (L 2001, ch 383, Part C, § 1).

The video lottery is played using video lottery terminals (VLTs), which are each connected to a central system through the use of "site controllers"-- computers that connect several VLTs both to each other and to the central system. In the most common form of video lottery gaming, participants at individual VLTs play against each other by purchasing electronic instant tickets from a finite pool. In order to play, individuals place cash or other currency into the VLT to purchase an electronic instant ticket. The player then determines the "game identifier" and the price of the electronic ticket to be purchased. The VLT receives the next ticket from the site controller and displays the predetermined outcome-win or loss. If the player wins, the VLT will print an "electronically encoded instrument" which can be used to play additional video lottery games or can be redeemed for value. [FN7]

> FN7. The only other game offered for video lottery play is electronic keno, which is modeled after the current Lotto and Quick Draw lotteries and involves multiple players selecting a series of numbers, colors or symbols in hopes of matching their selections to those later randomly drawn by the central system.

Plaintiffs argue that because video lottery gaming is played

using VLTs, which they contend resemble slot machines, the video lottery is not a lottery at all, but rather state-sponsored slot machine gambling forbidden by the Constitution. But whereas slot machines are not mentioned in the Constitution, lotteries are, and they are expressly permitted when operated by the state. Thus, if the video lottery is a lottery, the statute providing for it is constitutional regardless of whether the terminals used to play the lottery also look like, or even meet the Penal Law definition of, slot machines. [FN8]

> FN8. Indeed, although plaintiffs contend that VLTs fit within the Penal Law definition of a slot machine, as "a gambling device which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such manner that, depending upon elements of chance, it may eject something of value" (Penal Law § 225.00[8]), the definition of "[g]ambling device" specifically excludes lottery tickets and other items used to play a lottery (*see* Penal Law § 225.00[7]

Since the Constitution does not define the term "lottery," we must first determine what constitutes a lottery within the meaning of article I, § 9. The Penal Law definition of lottery--consisting of consideration, chance and prize (*see* Penal Law § 225.00[10]; *People v. Hines*, 284 N.Y. 93, 101 [1940], *overruled on other grounds People v. Kohut*, 30 N.Y.2d 183, 190-191 [1972]; *Trump v. Perlee*, 228 A.D.2d 367, 368 [1st Dept 1996])--provides little guidance, because, as the court below recognized, this definition applies equally to all forms of gambling or games of chance. Clearly, the limited constitutional exception for state-run lotteries cannot be read to allow any casino game (such as poker, blackjack or roulette) to constitute

a valid lottery if operated by the state. Thus, we agree with the Appellate Division (*see* 11 AD3d at 92) that a constitutional lottery requires something more--specifically, the use of tickets and multiple participation, as opposed to a single player competing against a single machine.

It is clear from the language of the Constitution that an authorized lottery requires the sale of tickets (*see* N.Y. Const, art I, § 9[1] ["no lottery or the sale of lottery tickets ... except lotteries operated by the state and the sale of lottery tickets in connection therewith ... shall hereafter be authorized or allowed within this state"]). The Senate debates concerning the 1966 amendment to article I, § 9--allowing state-run lotteries as an exception to the general prohibition against gambling--reflect the same understanding (*see e.g.* New York State Senate Debate Transcripts, 1965 N.Y. Constitution, June 14, 1965, at 4776, 4778, 4798). In addition, the constitutional history reflects that the Senate considered multiple participation an additional element of the definition of a lottery (*see* New York State Senate Debate Transcripts, 1965 N.Y. Constitution, June 14, 1965, at 4808).

The video lottery authorized by Part C is consistent with this definition. As noted above, players tender consideration (cash or other currency) to purchase electronic tickets and receive a prize in the form of compensation or chances to play additional games. Multiple participation is satisfied in that the VLTs are linked through the site controllers to a central system, and players compete against one another for prizes by purchasing tickets from a finite depleting pool of electronic instant lottery tickets, with a set number of predetermined winners randomly distributed, or by choosing a series of keno numbers, colors or symbols from a finite pool in the hope that they, as opposed to

other players, will have matched those colors, numbers or symbols later drawn, thus satisfying the element of chance. It is of no constitutional significance that the tickets are electronic instead of paper. The particular methods of conducting the lottery are subject to change with time. The language of the Constitution is not so rigid as to prevent this type of update and modernization. Thus, we conclude that the video lottery is a valid lottery under article I, § 9(1), and that, rather than slot machines, VLTs are simply mechanical devices for the implementation of the video lottery (*see e.g.* Tax Law § 1604[a][8]). [FN9]

> FN9. The Attorney General Opinions relied on by plaintiffs in support of their argument that the video lottery is not a lottery are inapposite (*see* 1981 Ops Atty Gen No. 68; 1984 Ops Atty Gen No. 1). The 1981 opinion addressed and found unconstitutional proposed video games, such as computer poker and blackjack, that did not involve multiple participation, electronic tickets, or predetermined identification of winning tickets based on random selection. Rather, those games involved a single player pitting his or her skill against a machine. The 1984 opinion involved a proposal by the Division of the Lottery to permit betting on the outcome of professional sports events, which involves an element of skill in picking the winning team or predicting the outcome of the game.

Plaintiffs also argue that Part C violated their rights to equal protection because it allows only certain local legislatures to vote to give prior approval for installation of VLTs. They argue that strict scrutiny should be applied because the issue involves the denial of the right to vote. However, as the Appellate

Division noted, "[e]ven in voter classification, a State is not prohibited from recognizing the distinctive interests of the residents of its political subdivisions" (*City of New York v. State of New York*, 76 N.Y.2d 479, 486 [1990] [holding that it was reasonable to permit Staten Island residents, but no other New York City residents, to vote on the issue of secession]). Thus, rather than strict scrutiny, we use a rational basis standard of review. When reviewing using a rational basis standard, "a classification must be upheld against an equal protection challenge if there is any *reasonably conceivable* state of facts that could provide a rational basis for the classification ... [I]ndeed, a court may even *hypothesize* the motivations of the State Legislature to discern any conceivable legitimate objective promoted by the provision under attack" (*Port Jefferson Health Care Facility v. Wing*, 94 N.Y.2d 284, 290-291 [1999] [citations and internal quotations omitted] [emphasis in original]). Here, it would have been rational for the Legislature to determine that certain racetrack communities were in greater need of the potential revenue that would be generated by the video lottery than others and, as a result, not require those areas to get prior local approval.

Reinvestment of Video Lottery Revenues

Defendants cross-appeal, arguing that Part C is constitutional in all respects. Specifically, they assert that the revenue distribution provisions requiring reinvestment in breeding funds and for the enhancement of purses is constitutional and, even if it is not, that the reinvestment provision is severable.

Part C provided for the allocation of revenue from the video lottery. The funds used to pay out prizes must be no less than 90% of video lottery sales (L 2001, ch 383, Part C, § 2). Fifteen percent of the remaining revenue--after the prizes were

paid--was allocated to the Division of the Lottery for administrative and operating expenses (L 2001, ch 383, Part C, § 2[5][A]). The legislation also authorized a vendor's fee for the track operator of between 12% and 25% of the revenue remaining after prizes (L 2001, ch 383, Part C, § 2[5][A]). [FN10] Further, a portion of the vendor's fee was required to be reinvested to enhance purses and for distribution to an appropriate breeding fund (L 2001, ch 383, Part C, § 2[5][B]). Specifically, 35% of the vendor's fee for the first year, and 45% beginning the second year, was allocated to enhance purses, and no less than 5% of the vendor's fee was apportioned to an appropriate breeding fund.

> FN10. This section was amended in 2003 to change the distribution of revenue to allot 10% to the Division and 29% to the track operator as a vendor's fee. The portion of the vendor's fee dedicated to enhancing purses was changed to 25.9% for the first three years, 26.7% for the next two years and 34.5% for each year after that. The percentage of the vendor's fee contributed to the breeding fund was also changed to 4.3% for the first five years and 5.2% for each subsequent year (L 2003, ch 63, Part W, § 2).

The statute has been very recently amended (L 2005, ch 61, Part CC, § 2). [FN11] The repeal of the reinvestment provisions, however, does not render our consideration of this issue moot. This new legislation is prospective only, in that it "shall take effect immediately" (L 2005, ch 61, Part CC, § 6). As a result, an actual controversy remains as to the constitutional validity of the reinvestment provision of Part C of Chapter 383 of the Laws of 2001, for the payments that have already been made under Tax Law § 1612(c)(1).

FN11. The recent amendment removes the revenue distribution provisions that required portions of the vendor's fee to be allocated to enhancing purses and an appropriate breeding fund. The new statute increases the vendor's fee to "thirty-two percent for the first fifty million dollars annually, twenty-nine percent for the next hundred million dollars annually, and twenty-six percent thereafter" (L 2005, ch 61, Part CC, § 2, codified at Tax Law § 1612[b]). The legislation further provides for "an additional vendor's marketing allowance ... to be used by the vendor track for the marketing and promotion and associated costs of its video lottery gaming operations ..." (L 2005, ch 61, Part CC, § 2).

We hold that the reinvestment provision of Part C is constitutional. The Constitution requires that the net proceeds from the sale of lottery tickets "shall be applied exclusively to or in aid or support of education in the state as the legislature may prescribe" (N.Y. Const, art I, § 9[1]). "Net proceeds" means gross proceeds less any appropriate charges and expenses. It is for the Legislature to determine the necessary expenses incurred in operation of the lottery and, thus, what remaining portion of the total lottery revenue will constitute net proceeds. Here, the Legislature has prescribed that net proceeds consists of all money remaining after the payment of administrative expenses, including the vendor fee.

Plaintiffs misapprehend the nature of the reinvested funds. These moneys are not a separate deduction, beyond other costs and expenses, from the amount paid to the racetracks as a vendor fee. Rather, they constitute simply a part of the vendor

fee itself--but a part whose use the State has decided to regulate. Thus, with respect to the fees earned by the racetracks, the State, which heavily regulates the racing industry, has made a policy determination that the tracks cannot simply retain as profit their entire fee after payment of costs, but must reinvest a percentage back in the industry itself. Placing such restrictions on the use of the tracks' earned profits is a common practice in the racing industry. Many statutes that allow for revenues to the racetracks from various activities require that a specified portion of those permitted revenues be reinvested in this way (*see e.g.* Racing, Pari-Mutuel Wagering and Breeding Law § 229[1][b] [fifty percent of compensation received by nonprofit racing association or corporation from simulcasting or wagering outside New York to be distributed to purses]; Racing Pari-Mutuel Wagering and Breeding Law § 318[1][a][ii] [percentages of total pool resulting from on-track harness racing bets to be used exclusively for purses]; Racing Pari-Mutuel Wagering and Breeding Law § 527[3][a] [fifty percent of portion of retained commission on off-track pools distributed to racing associations and corporations to be used exclusively for increasing purses]; Racing Pari-Mutuel Wagering and Breeding Law § 527[1] [twenty percent of "breaks" derived from bets on off-track harness races and fifty percent of "breaks" of other races to be paid to breeders' funds]).

The revenue to be reinvested belongs to the racetracks in the first instance. Since the vendor fee that must be paid to the tracks is a cost to the State, the reinvestment requirement imposes an administrative cost on the racetracks, not on the State Division of the Lottery. But net proceeds of the lottery are proceeds remaining after costs to the Division, not to the racetracks.

The Legislature's decision to regulate the racetracks in this way reflects a policy determination constitutionally within its purview. The Legislature was entitled to determine first, that mandatory reinvestment of a certain percentage of the racetracks' profits in enhanced purses and breeding funds would improve the health of the racing industry, declining in recent years, [FN12] and second, that a revitalized racing industry would attract more visitors to the racetracks--where VLTs were to be located--who would in turn participate in increased video lottery gaming, thus raising additional revenue for education.

> FN12. In this regard, defendants contend that in recent years, since the New York racetracks, facing declining revenues, have been unable to offer large enough purses to attract quality horses, the top horses have been drawn instead to races in other states. Because high-quality horses lead to better-quality racing which in turn attracts more spectators, fewer people have been coming to the New York tracks to bet, resulting in less money spent from which to pay purses, attracting fewer players still. Similarly, breeding funds are used in part to improve the quality of the horses that are bred, and therefore raced, here in New York (*see Saratoga Harness Racing Assn. v. Agriculture & New York State Horse Breeding Dev. Fund,* 22 N.Y.2d 119, 123 [1968] [breeding funds are "the instrument through which the Legislature has chosen to effectuate [the] legitimate public interest and purpose" of applying a portion of the revenues from racing to the "general improvement of the sport and the facilities used"]).

A vendor's fee, offered not only as reimbursement but also as an incentive for the vendor to offer lottery tickets for sale on the

vendor's premises, is a necessary administrative cost of operating the lottery, because if there is no one to sell tickets (or operate VLTs), there will be no lottery, and ultimately no money earned for education. Indeed, Part C expressly contemplated that the vendor's fee to be established would "ensure the maximum lottery support for education while also ensuring the effective implementation of [Tax Law § 1617-a (authorizing the operation of the video lottery)] through the provision of reasonable reimbursements and compensation to vendor tracks for participation in such pilot program" (L 2001, ch 383, Part C, § 2). The policy determination by the Legislature that the enacted allocation of funds would result in the greatest benefit to education was properly theirs to make.

It is generally not for the courts to determine whether a particular vendor's fee set by the Legislature is reasonable. While we can perhaps imagine a case where a "fee" was so excessive as to constitute nothing more than a flagrant end-run around the requirement that the net proceeds of the lottery be applied exclusively to education, the fee at issue here does not begin to approach that standard. Every lottery ticket agent in the state receives a fee of 6% of total ticket sales (*see* 21 NYCRR 2805.10), far higher than the fee paid to the racetracks under Part C. Indeed, as originally enacted, the vendor fee was to be fixed by the Division of the Lottery at between 1.2% and 2.5%. [FN13] After conducting a study and comparing the rates with those fixed by other states, the Division set the rate at the highest permissible level--2.5%. At that level, however, not a single racetrack signed up to participate in the video lottery pilot program. [FN14] The Legislature therefore amended the statute to allow for a fixed percentage of 2.9% (a portion of which was to be reinvested). [FN15] Still, New York's vendor fee remains significantly lower than that of other states offering

VLTs at racetracks. Thus, we disagree with the Appellate Division that the vendor's fee set by the Legislature was "inflated," and find Part C of Chapter 383 of the Laws of 2001 constitutional in its entirety.

FN13. Part C set the vendor's fee at between 12% and 25% of the total revenue wagered less the amount paid for prizes (*see* L 2001, ch 383, Part C, § 2). Since the prize payout is to be no less than 90% of total sales (*see* L 2001, ch 383, Part C, § 2), the fee amounts to between 1.2% and 2.5% of gross sales.

FN14. The initial capital investment and continued operating costs of offering video lottery gaming can be significant. The vendor must provide space for the terminals, install and maintain them, and provide increased staff, parking and security for the VLT area. Finger Lakes Racetrack, for example, anticipated its costs of construction, new employees and a variety of other improvements to be nearly $11 million, none of which would be incurred by the State.

FN15. The 2003 amendment increased the vendor's fee to 29% of total revenue wagered less the amount paid for prizes--or 2.9% of gross sales (*see* L 2003, ch 63, Part W, § 2). The 2005 amendment has increased the vendor's fee to between 2.6% and 3.2% of gross sales, varying as the revenue increases (*see* L 2005, ch 61, Part CC, § 2).

Mega Millions

Finally, plaintiffs challenge the constitutionality of Part D of Chapter 383 of the Laws of 2001. Pursuant to this legislation,

authorizing the Division of the Lottery to "enter into an agreement with a government-authorized group of one or more other jurisdictions providing for the operation and administration of a joint, multi-jurisdiction, and out-of-state lottery" (L 2001, ch 383, Part D, § 3 [codified at Tax Law § 1617]) New York entered into an agreement with nine other states to participate in Mega Millions. [FN16] As noted above, the State Constitution prohibits lotteries in general, but makes an exception for lotteries "operated by the state" (N.Y. Const, art I, § 9 [1]).

> FN16. The other states are Georgia, Illinois, Maryland, Massachusetts, Michigan, Virginia, New Jersey, Ohio and Washington.

The Mega Millions agreement specifically provides that the revenue generated by the lottery within each state remains in that state for distribution according to that jurisdiction's relevant requirements. The states agreed to operate the lottery jointly--including sharing start-up costs and operating expenses. As for the responsibility of paying out prize money, each state is liable for a percentage of its sales proportionate to the total amount of sales. The agreement further provides that the laws of the state will control in the event of any conflict between state law and the Mega Millions agreement. Any claims or litigation involving tickets sold in New York must be determined under New York law. No state will be held accountable for the negligent actions or omissions of the agents or employees of another state lottery. Each state is also permitted to withdraw from the Mega Millions agreement either upon six months notice or immediately if the withdrawal is by operation of law.

Plaintiffs make two arguments in support of their position.

First, they argue that the multi-state lottery is not "operated by the state" as required by the Constitution (N.Y. Const, art I, § 9[1]). Next, they assert that the net proceeds are not "applied exclusively to or in aid or support of education in this state" (N.Y. Const, art I, § 9[1]). We address these arguments in turn.

Although several jurisdictions are involved, New York retains sufficient control over the sale of Mega Millions tickets so that it operates the lottery within the state. According to both the terms of the Mega Millions agreement and the Tax Law, New York retains the authority to specify where and in what manner the lottery tickets may be sold (*see* Tax Law § 1604[a][6], [7]). The Division of the Lottery also has the power to license ticket agents and determine the manner and amount of compensation due to such agents (*see* Tax Law § 1604[b], [a][9]). The Mega Millions procedures comply with New York law and, if at any time they no longer comply, the State is free to withdraw from the agreement.

That other states share in certain administrative costs and functions does not change our conclusion. The Division of the Lottery regularly contracts with outside vendors and other entities for various equipment and services to assist in the operation of the State lottery. Although different states operate different aspects of the multi-state lottery, [FN17] that does not change New York's operation of Mega Millions within the state. While the State may not have exclusive control over every aspect of the Mega Millions lottery, it operates the multi-state lottery within New York as required by the Constitution (*see* art I, § 9[1]). [FN18]

FN17. For example, the Virginia Lottery maintains the

grand prize funds and the Georgia Lottery Corporation conducts the actual drawing.

FN18. Other courts have addressed the constitutionality of a state's participation in a multi-state lottery (*see State ex rel. Ohio Roundtable v. Taft*, 2003 Ohio App. LEXIS 3042 [2003] *appeal denied* 100 Ohio St 3d 1484; *Tichenor v. Missouri State Lottery Commission*, 742 S.W.2d 170 [Mo 1988]). *Ohio Roundtable* specifically addressed the propriety of the Mega Millions agreement against a state constitutional provision allowing "an agency of the state to conduct lotteries" (Ohio Const, Section 6, Article XV; *see Ohio Roundtable*, 2003 Ohio App. at * *9). The court did not find any significant difference between the State contracting with private entities to implement its in-state lottery games and contracting with other states to implement Mega Millions (*Ohio Roundtable*, 2003 Ohio App LEXIS 3042, at * *18). Ohio retained a sufficient amount of control over the lottery--since it was conducted in accordance with the State's regulations--to satisfy the State Constitution (*see Ohio Roundtable*, 2003 Ohio App LEXIS 3042, at * *21; see also Tichenor 742 S.W.2d at 174).

Next, we address whether the net proceeds from Mega Millions are "applied exclusively to or in aid or support of education in this state" (N.Y. Const, art I, § 9[1]). Net proceeds are reasonably understood as the amount of revenue remaining after the distribution of prize money and necessary administrative expenses (*see* Tax Law § 1619[j][2]). The Mega Millions agreement specifies that the states will share equally in any joint start-up and operating costs. As the Appellate Division

determined, the expenses paid by New York are used to satisfy the actual administrative costs of operating the multi-state lottery. There is no indication that the funds are used to advance the governmental purposes of other states (*see Dalton*, 11 AD3d at 106). Thus, the necessary net proceeds, less the required administrative expenses, remain in New York and are appropriately dedicated to education within the state. Thus, we reject plaintiffs arguments that Part D is unconstitutional.

Plaintiffs' final argument that the Governor's message of necessity was unconstitutional under article III, § 14, is without merit (*see Maybee v. State of New York*, --- NY3d ----, 2005 N.Y. LEXIS 1026).

In conclusion, we hold Parts B, C and D of Chapter 383 of the Laws of 2001 to be constitutional. Plaintiffs have failed to meet their burden of proving beyond a reasonable doubt the invalidity of the legislation. As to Indian gaming compacts, since "as a matter of criminal law and public policy" Class III gaming activity is not prohibited in New York, and although heavily regulated, it is permitted for charitable and other purposes, IGRA's mandate allows the State to play an important and essential role in regulating gambling on Indian lands. Allowing video lottery terminals and participation in Mega Millions further promotes the state's public policy to increase funding for education via state-sponsored lotteries. We find no constitutional infirmity in the legislation. Although some may argue the wisdom of the policy choice, the Legislature has made a valid legislative judgment.

Accordingly, the order of the Appellate Division should be modified, with costs to defendants, by declaring Part C of Chapter 383 of the Laws of 2001 constitutional and, as so

modified, affirmed.

G.B. SMITH, J. (dissenting in part).

Article I, § 9 of the New York State Constitution prohibits the Legislature from enacting legislation authorizing commercialized gambling and directs the Legislature to pass laws preventing such gambling. In light of Article I, § 9, the main issue in this case is whether the Indian Gaming Regulatory Act ("IGRA")(Public Law 100-197, codified at 25 USC § § 2701-2721 and 18 USC §§ 1166-1168) authorizes the Legislature to enact legislation, e.g., Part B of Chapter 383 of the Laws of 2001, empowering the Governor to negotiate and enter into compacts with Indian tribes for the establishment and operation of commercialized gambling casinos in New York State where such casinos would ordinarily be impermissible. Based on a review of the relevant law, IGRA does not authorize the New York State Legislature to enact such legislation. Accordingly, the Legislature had absolutely no authority to enact Part B of Chapter 383 of the Laws of 2001. Because the Legislature does not have the authority to enact such legislation, that purported legislation has no effect. From this it follows that the Governor, who pursuant to *Saratoga County Chamber of Commerce v. Pataki* (100 N.Y.2d 801, *cert denied*, 540 U.S. 1017 [2003]) must have valid legislative approval in order to bind New York State to a tribal-state gaming compact, does not have the power to even enter into compact negotiations with Indian tribes for the establishment of "for-profit" casino gaming in New York State. Moreover, IGRA does not and cannot require or authorize the Governor to enter into such negotiations.

The majority's conclusion, that Part B is constitutional, fails to

adequately consider the plain language of Article I, § 9, New York's statutory scheme (e.g., the general municipal and penal laws) which prohibits commercialized gambling, New York's strong, historical public policy against such gambling as reflected in making Article I, § 9 a part of the Bill of Rights of the New York State Constitution. Most importantly, the majority's conclusion bypasses the citizens of New York State who have expressed their opposition to commercial gambling and who have not had their say, one way or the other, via the amendment process, as to whether the Legislature should be given the authority to enact legislation allowing for the type of commercialized, casino gambling contemplated under Part B. I, therefore, dissent and would hold that: 1) Part B of Chapter 383 is unconstitutional; 2) any compact(s), entered into pursuant to Part B of Chapter 383, are void and unenforceable; 3) casinos opened and now operating pursuant to such a compact should be declared illegal; [FN1] and 4) the Governor and other New York State officials should be declared unauthorized to enter into activities in furtherance of Part B of Chapter 383 (e.g., any compact negotiations should cease immediately) unless and until the New York State Constitution is amended.

> FN1. In August 2002, pursuant to Part B of Chapter 383, a compact was purportedly entered into by New York State and the Seneca Nation of Indians, resulting in the establishment of the Seneca Niagara Casino and Seneca Allegany Casino. Because the subject legislation authorized the Governor to negotiate and enter into a compact, on behalf of New York State, resulting in the establishment of casinos that conduct gaming prohibited under New York law, this compact must be deemed unenforceable. Moreover, in the absence of a valid

compact, the class III casino-style gaming conducted at these facilities is not lawful (*see* 25 USC 2710[d][1][C]; *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 [1996]). Thus, the casinos would have to cease operations with respect to the unlawful gaming activity.

FACTS

Background

The case at bar has its origins in *Saratoga County Chamber of Commerce v. Pataki* (*supra*). In 1993, then Governor Mario Cuomo, under the auspices of IGRA but without legislative authorization, entered into a Tribal-State Compact with the St. Regis Mohawk Tribe allowing the Tribe to establish a "Class III" commercialized gambling casino at its Akwesasne reservation in upstate New York. This Court initially held that "IGRA does not preempt state law governing which state actors are competent to negotiate and agree to gaming compacts" (*Saratoga County*, 100 N.Y.2d at 822). [FN2] Additionally, this Court (1) concluded that the negotiation of Tribal-State Compacts involves issues affecting the health and welfare of state residents, implicating policy choices within the power of the Legislature; (2) ruled that the Governor, by acting without legislative authorization, had violated the separation-of-powers doctrine; and (3) declared the 1993 Compact void and unenforceable. *Saratoga County* specifically left open the following question: would such a compact, assuming that the Governor had authorization to enter into it, violate Article I, § 9 of the New York State Constitution (*see Saratoga County*, 100 N.Y.2d at 824-25). However, the first question that must be answered is whether the Legislature, in light of the limitations on legislative power set forth in Article I, § 9 of the New York

State Constitution, has the authority to pass a law (e.g., Part B of Chapter 383) empowering the Governor to negotiate and enter into compacts for the establishment of gaming prohibited under the State Constitution. [FN3] As indicated above, that question must be answered in the negative.

> FN2. This Court noted that IGRA "identifies no particular state actor who shall negotiate the compacts; that question is left up to state law (*see Pueblo of Santa Ana v. Kelly*, 104 F3d 1546, 1557 [10th Cir.1997], *cert denied* 522 U.S. 807 [1997])" (*id.*).
>
> FN3. The *Saratoga County* Court never reached that question.

Part B of Chapter 383 of the Laws of 2001

In October 2001, the State Legislature met in an emergency session to consider measures to assist those devastated by the September 11, 2001 World Trade Center disaster, promote economic development in the State and generate revenue. Late in the session, each branch of the Legislature considered an omnibus, 81-page bill containing 27 distinct parts, including three parts relating to gambling (Senate Bill 5828, Assembly Bill 9459). [FN4] During the Senate and Assembly debates on these bills, legislators discussed a number of items, including, but not limited to, (1) the process by which the bills came before them (each bill was accompanied by a message of necessity and an immediate vote was required after the debate), (2) the relatively short time that they had to consider the important and wide-sweeping bills, the proposed gambling provisions, especially Part B, which were touted as a means of generating revenue and criticized both generally as a drastic

departure from New York's policy against commercial gambling and specifically regarding the evils associated with such gambling, [FN5] (3) the fact that many rank and file legislators were left in the dark regarding the decision-making process on these provisions (e.g., some legislators commented that there were no public hearings or conference committees for the proposed gambling measures), and (4) the fact that a number of legislators indicated that they would vote to pass the bills because, although they did not necessarily agree with the proposed gambling measures, they fully supported other proposed measures, including those which provided for low cost electricity to businesses dislocated as a result of the destruction of the World Trade Center, an expansion of the Child Health Plus system, Urban Development Corporation loan guarantees, and the creation of liberty zones for the World Trade Center Disaster Area.

> FN4. Under Part B of the proposed legislation, the Governor would receive the authority to enter into tribal-state compacts for the establishment of up to six new casinos on Indian lands. Under Part C, the Division of the Lottery ("Division") would be permitted to license the operation of video lottery terminals at pari-mutuel racetracks. Under Part D, the Division would be allowed to participate in any joint, multi-jurisdiction, out-of-State lottery game adopted in accordance with the existing statutory requirements for Lottery planning and reporting.

> FN5. For example, Senator Duane referred to gambling as a "tax on the poor."

On October 24 and 25, 2001, the Legislature passed these bills,

which became Chapter 383 of the Laws of 2001. This case involves a challenge to the constitutionality of Parts B, C and D of Chapter 383. However, for purposes of this opinion, I focus on Part B of Chapter 383 of the Laws of 2001 which:

1) provides that the Governor "may execute a tribal-state compact with the Seneca Nation of Indians pursuant to [IGRA] consistent with the memorandum of understanding ['MOU'] between the governor and the president of the Seneca Nation of Indians executed on [June 20, 2001]" (Executive Law § 12[a]); [FN6] 2) permits the Governor to execute tribal-state gaming compacts "authorizing up to three Class III gaming facilities in the counties of Sullivan and Ulster" (Executive Law § 12[b]); [FN7] and 3) provides that, "[p]ossession of a slot machine shall not be unlawful where such possession and use is pursuant to a gaming compact, duly executed by the governor and an Indian tribe or Nation, under [IGRA] * * * " (Penal Law § 225.30[b]).

> FN6. Under the MOU, up to three "Class III" casinos were provided for. One was to be located in Niagara County in the City of Niagara Falls. One was to be located in Erie County in the City of Buffalo. Finally, the MOU provided for "the establishment of "Class III" gaming on current reservation territory, should the Nation at some point in the future decide to pursue such a facility, with the precise location to be determined by the Nation at such later date" (R. 156-57).
>
> FN7. Here, the Indian tribes have not been determined and the casino locations were not specified.

On August 18, 2002, the Seneca Nation of Indians entered into a compact with New York State. [FN8] To date, two casinos

have been built pursuant to this Compact. On or about December 31, 2002, the Seneca Niagara Casino in Niagara Falls, New York opened for business (*see* Park Place Brief at 24; Seneca Gaming Corporation overview, http://www.senecagamingcorporation.com/companyOverview.html). On or about May 1, 2004, the Seneca Allegany Casino in Salamanca, New York opened for business (*see* Seneca Gaming Corporation overview). Both casinos are currently operating.

> FN8. The Tribal-State Compact states, in pertinent part: "This Compact is made and entered into between the Seneca Nation of Indians, a sovereign Indian nation ('Nation') and the State of New York ('State') pursuant to the provisions of * * * [IGRA]. * * *
> NOW, THEREFORE, the NATION and the STATE, consistent with the Memorandum of Understanding between the State Governor and the President of the Seneca Nation of Indians executed on June 20th 2001, and in consideration of the undertakings and agreements hereinafter set forth, hereby enter into this Class III Gaming Compact".

Procedural History and Parties

On January 29, 2002, the instant declaratory judgment actions were filed in Supreme Court, Albany County. [FN9] Plaintiffs in both actions allege that: 1) Parts B, C and D of Chapter 383 violate Article I, § 9, which basically provides that the only permissible forms of gambling in New York are state-operated lotteries to raise funds for education, pari-mutuel betting on horse races, and certain games of chance operated by religious, charitable or non-profit organizations; and 2) Chapter 383 was enacted in violation of Article III, § 14 of the New York State

Constitution. Plaintiffs seek a declaration that Parts B, C and D of Chapter 383 of the New York State Laws of 2001 are illegal, unconstitutional, and null and void, and a permanent injunction enjoining State officials and others from implementing this legislation.

FN9. The *Dalton* action (Action No. 1) was commenced on behalf of a broad coalition of citizen taxpayer-voters (Joseph Dalton, Reverend Duane Motley, Mr. Lee Karr, G. Stanford Bratton, Reverend John Ekman and Chaskiel Rozenburg), State Legislators (Senator Frank Padavan and Assemblyman William Parment) and organizations (New Yorkers for Constitutional Freedoms, Ltd., the Coalition Against Casino Gambling and the Presbyterian and New England Congregational Church) opposed to the spread of gambling throughout New York State. The *Karr* action (Action No. 2) was brought on behalf of Mrs. Lee Karr, a citizen taxpayer-voter opposed to the spread of gambling throughout New York State.

The defendants in both actions were: 1) Governor George Pataki, the State of New York, the New York State Racing and Wagering Board, Arthur J. Roth, as Commissioner of Tax and Finance of the State of New York, Division of the Lottery, New York State Comptroller H. Carl McCall, New York State Racing Association, Finger Lakes Racing Association, Yonkers Racing Corporation, Mid-State Raceway, Inc. and Monticello Raceway Management, Incorporated.

Note, by Stipulation of Discontinuance dated November 21, 2002, both actions were discontinued with prejudice only as to defendant H. Carl McCall.

After the actions were commenced, Park Place Entertainment Corporation (now known as Caesars Entertainment, Inc.) ("Park Place") sought to intervene as a defendant in Action No. 1. Park Place, which described itself as "one of the world's largest gaming companies," argued that it has a substantial interest in ensuring that Part B is upheld as constitutional, and that it would be adversely affected and bound by any judgment invalidating Part B of Chapter 383. [FN10] Regarding its substantial interest, Park Place asserted that in April 2000, it entered into an agreement with the St. Regis Mohawk Tribe under which Park Place secured exclusive development and management rights for the Tribe's future casinos in New York State. Further, Park Place asserted that it entered into an agreement for an option to acquire property (i.e., Kutsher's Resort Hotel and Country Club) in Sullivan County, New York in order to build a casino at that location. [FN11] Finally, Park Place claims to have "expended millions of dollars in preparation for the construction and operation of this project that it expects to manage on behalf of the [Tribe]." [FN12] By Stipulation and Order dated February 15, 2002, the parties to Action No. 1 and the attorneys of Park Place agreed that Park Place may intervene in this action and shall serve a pleading answering or responding to the complaint.

> FN10. When asked about its interest in this matter during oral argument, Park Place noted that under IGRA, Indian tribes may enter into management contracts with experienced companies, like Park Place, to assist in managing the Indian gaming operations. Park Place also noted that a stated purpose of IGRA is to promote the economic development of the tribe, that the monies generated from the gaming activities are used towards that end, and that it is in the tribe's interest

to affiliate themselves with experienced management companies.

FN11. Park Place asserted that in March 2001, "the Mohawks filed a Land-Into-Trust application with the Bureau of Indian Affairs of the U.S. Department of the Interior to have 66 acres of the Kutsher's land under option to Park Place taken into trust for the Mohawks to be used for Indian gaming purposes" (R.312). According to the record, this application is still pending.

FN12. It is telling that one of the largest casino developers/operators/managers has intervened in this suit. Companies, like Park Place, who have or are in the process of developing Indian casinos in New York State stand to lose quite a bit of money if Part B of Chapter 383 is struck down and they are unable to: 1) recoup their initial investment in the development of the casinos; and 2) reap the benefits (e.g., management fees) for operating and/or managing the open casinos.

In April 2002, the State defendants and Park Place each brought pre-answer motions to dismiss pursuant to CPLR 3211. The State defendants moved to dismiss the complaint in its entirety and Park Place moved to dismiss the first three causes of action relating to Part B of Chapter 383 of the Laws of 2001. By Order dated October 30, 2002, Supreme Court dismissed the motions in their entirety as premature. Further, on that date, Action Nos. 1 and 2 were consolidated and the parties were permitted to cross-move for summary judgment.

On July 17, 2003, Supreme Court granted summary judgment in defendants' favor. The court upheld the constitutionality of

Parts B, C and D of Chapter 383, and dismissed the complaints in their entirety. The court held that the State Constitution poses no bar to Indian casino gaming in New York because "New Yorkers have adopted a public policy that permits considerable gambling, although regulated." In so holding, the court adopted the Second Circuit's holding in *Mashantucket Pequot Tribe v. State of Connecticut* (913 F.2d 1024 [2d Cir.1990][ruling that states that allow charities to conduct class III gaming must negotiate in good faith with a tribe wishing to do the same]) and the analysis from Judge Read's dissent in *Saratoga County*. [FN13]

> FN13. According to Judge Read, "IGRA mandates that, if a state allows any class III gaming by any person, a tribe may seek to conduct the same games on its lands" (*Saratoga County*, 100 N.Y.2d at 842).

On July 7, 2004, the Appellate Division, Third Department modified the Supreme Court's order. The court affirmed the Supreme Court's ruling regarding the constitutionality of Parts B and D of chapter 383 of the Laws of 2001; however, it declared that Part C was unconstitutional. Regarding Part B, the court determined that, "pursuant to IGRA, a state may enter into tribal-state compacts permitting particular class III, casino-type gaming activities on tribal lands if the state permits any person to conduct those particular gaming activities for any purpose, including a charitable purpose. That a compact permits a certain game to be conducted in a manner that is otherwise inconsistent with state law will not render it invalid if the game is not completely prohibited. Because New York permits the gaming activities at issue here for charitable purposes, subject to heavy regulation, the gaming is properly the subject of a tribal-state compact" (*Dalton v. Pataki*, 11 AD3d 62, 67 (3d Dept.2004).

Moreover, the court held that the Governor would be able to negotiate tribal-state compacts with Indian tribes to conduct casino-style gaming on lands that were not "Indian Lands" at the time of IGRA's enactment if the Governor concurs with the Secretary of the Interior's determination that casino gambling would be in the best interest of the Indian tribe and not detrimental to the surrounding communities.

Plaintiffs and defendants appeal and cross-appeal, respectively, pursuant to CPLR 5601(b)(1).

Discussion

By holding that Part B of Chapter 383 of the Laws of 2001 is constitutional, the majority of this Court and the lower courts have basically held that Congress can require the New York State Legislature to pass a law it ordinarily could not, i.e., a law empowering the Governor to enter an agreement for the establishment of gambling activity that does not comport with this State's Constitution. Since the gambling activity at issue here has not been put before and approved by the citizens of New York as an exception to the general prohibition against gambling set forth in Article I, § 9 of the New York State Constitution, the Legislature cannot pass legislation authorizing the Governor to enter into agreements for the establishment of commercial gambling facilities. Therefore, Part B of Chapter 383 must be set aside as unconstitutional. [FN14]

> FN14. That is, Executive Law § 12 and the amendments to Penal Law § 225.30(a)(1),(b) must be set aside as unconstitutional.

Background and Purpose of the Indian Gaming Regulatory Act

Congress passed IGRA on October 17, 1988, pursuant to its

power to regulate commerce "with the Indian Tribes" (U.S. Const., Art. I, § 8, cl.3) and in response to the United States Supreme Court's decision in *California v. Cabazon Band of Mission Indians* (480 U.S. 202 [1987]). In *Cabazon*, which was decided about a year before IGRA was enacted, the Supreme Court held that a state which regulates rather than prohibits gambling must permit Indian tribes to conduct gambling on their lands (*see, Cabazon*, 480 Us at 209). The Court further held that Indian tribes would be forbidden from conducting gambling if a particular state prohibits such gambling altogether (*id.*) To deal with this regulatory/prohibitory distinction, the *Cabazon* Court stated: "The shorthand test is whether the conduct at issue violates the State's public policy." (*Cabazon*, 480 U.S. at 209). The primary purpose of IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" (25 USC 2702[1]). [FN15]

> FN15. IGRA also attempts to regulate the gaming so as to avoid "corrupting influences" and seeks to ensure that the Indian tribes are the primary beneficiaries of the gaming (*see* 25 USC § 2702).

IGRA divides gaming on Indian lands into three classes. [FN16] Class I games, defined as social games for minimal prizes and traditional Indian or ceremonial games, are within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of IGRA (*see* 25 USC 2703[6]; 25 USC 2710[a] [1]). Class II games, such as bingo, lotto, pull tabs, tip jars, punch boards and card games, but not banking card games (e.g., chemin de fer, baccarat and blackjack), fall within tribal jurisdiction but are subject to the provisions of

IGRA (*see* 25 USC 2703[7]; 25 USC 2710[a][2]). Class III gaming, which is defined as "all forms of gaming that are not class I or class II gaming" (25 USC 2703[8]) and includes banking cards, horse racing, slot machines and the commercialized, casino gambling at issue here, is subject to the terms and conditions of tribal-state compacts.

> FN16. "The term 'Indian lands' means--(A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power" (25 USC 2703[4]). Generally, gaming on lands acquired after October 17, 1988 by the Secretary of the Interior and "held in trust for the benefit of an Indian tribe," except for "lands located within or contiguous to the boundaries of [an Indian reservation]," is not permitted (25 USC 2719[a]). However, IGRA authorizes gaming on Indian lands acquired after October 17, 1988 if the Secretary of the Interior, "after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination" (25 USC 2719[b][1][A]).

Requirements for Class III Gaming

IGRA provides, "Class III gaming activities shall be lawful on Indian lands only if such activities are:

(A) authorized by an ordinance or resolution that-

(i)is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b), and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect" (25 USC 2710[d][1]). [FN17]

FN17. According to its legislative history, IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands" (S.Rep. No. 100-446, 100th Cong., 2d Sess., Statement of Policy, at 6). However, with regard to class III gaming, Congress contemplated that such gaming on Indian lands would only be permissible if states and Indian tribes employed a system of compacts for the regulation of such gaming (*id.*). Under this system of compacts, the federal government cedes regulatory oversight authority as to class III gaming conducted on Indian lands and permits states and Indian tribes to jointly regulate such gaming. This system exists so that the respective interests of the state and Tribe (i.e., two equal sovereigns) will be taken into account. Moreover, there can be no class III gaming on Indian lands without a valid tribal-state compact (*see* 25 USC § 2710[d][1][C]) in a state that permits the specific gaming, set forth in the compact, for any purpose by any person, organization, or entity (*see* 25 USC §

> 2710[d][1][B]). Thus, through tribal-state compacts, states maintain "some measure of authority over gaming on Indian lands" (*Seminole Tribe*, 517 U.S. at 58).

In determining whether class III gaming will be allowable on Indian lands, the tribal-state compacting requirement is of primary importance under IGRA. However, before discussing this requirement, it is necessary to examine IGRA's legislative history regarding compacts because this history makes clear that Congress: 1) considers a state and Indian tribe engaged in compact negotiations to be equal sovereigns; 2) considers the state's interest, in ensuring that its law and public policy are adhered to, important to the compacting process; and 3) does not require a state to abandon its own constitution or laws in order to have or regulate class III gaming. The Senate Report, which accompanied the bill (S.555) that eventually became IGRA and sets forth IGRA's legislative history, provides, in pertinent part:

> "Class III--tribal-State compacts. * * * [T]he [Select Committee on Indian Affairs ("Committee")] concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises such as parimutuel horse and dog racing, casino gaming, jai alai and so forth. The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the strong tribal opposition to any imposition of State jurisdiction over activities on Indian lands. The Committee concluded that the compact

process is a viable mechanism for setting various matters between two equal sovereigns" (S.Rep. No. 100- 446, 100th Cong., 2d Sess., Explanation of Major Provisions, at 13).

The Senate Report further provides that:

"both State and tribal governments have significant governmental interests in the conduct of class III gaming. *States and tribes are encouraged to conduct negotiations within the context of the mutual benefits that can flow to and from tribe and States. This is a strong and serious presumption that must provide the framework for negotiations.* A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders. *A State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system,* including its economic interest in raising revenue for its citizens" (id.)(emphasis added).

Regarding the Committee's intent, the Senate Report provides that:

"It is the Committee's intent that the compact requirement for class III not be used as a justification by a State for excluding Indian tribes from such gaming or for the protection of other State-licensed gaming enterprises from free market competition with Indian tribes" (S.Rep. No. 100-446, 100th Cong., 2d Sess., Explanation of Major Provisions, at 13).

Further, *"States are not required to forgo any State governmental rights to engage in or regulate class III gaming*

except whatever they may voluntarily cede to a tribe under a compact" (*id.* at 14, emphasis supplied).

With respect to the tribal-state compact requirement, IGRA provides that an Indian tribe, seeking to conduct class III gaming on its land, may initiate the compacting process by asking the state in which the proposed activity is to take place to engage in negotiations for the purpose of entering a Tribal-State compact (*see* 25 USC 2710[d][3][A]). When the tribe requests a state to enter into compact negotiations, both the tribe and the state shall negotiate in good faith (*id.*). [FN18] However, IGRA does not require that a State accept or enter into a Compact. Moreover, class III gaming shall not be imposed on states where such gaming is forbidden. 25 USC 2701(5) provides:

> FN18. IGRA provides that, "The United States district courts shall have jurisdiction over any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under [25 USC 2710(d)(3)(A)] or to conduct such negotiations in good faith" (25 USC 2710[d][7][A][i]). Note, the United States Supreme Court has held that the Indian Commerce Clause does not grant Congress the power to abrogate the states' sovereign immunity from suit through 25 USC 2710(d)(7), "and therefore, § 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued" (*Seminole Tribe,* 517 U.S. at 47).
>
> Further, where an Indian tribe introduces evidence that it requested a state to enter compact negotiations more than 180 days before, no tribal-state compact was

entered into, and the state did not respond to the Indian tribe's request for compact negotiations or did not respond in good faith, the burden of proof shifts to the state to prove that it negotiated in good faith (*see* 25 USC 2710[d][7][B][i],[ii]).

"[I]f the court finds that the state has failed to negotiate in good faith * * *, the court shall order the State and [ ] Indian [t]ribe to conclude such a compact within a 60-day period" (25 USC 2710[d][7][B] [iii]). Further, "If a State and Indian tribe fail to conclude a Tribal-State compact [after 60 days], the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select * * * the one which best comports with [IGRA and other applicable Federal law]" and submit the selected compact to the State and Indian tribe. (25 USC 2710[d][7][B][iv],[v]). "If a State consents to [the] proposed compact [within 60 days of the mediator's submission of the proposed compact to the State], the proposed compact shall be treated as a Tribal-State compact (25 USC 2710[d][7][B][vi]). However, "If the state does not consent [within 60 days], the mediator shall notify the Secretary [of the Department of the Interior] and the Secretary shall prescribe, in consultation with the Indian tribe, procedures [ ] consistent with the proposed compact selected by the mediator * * *, [IGRA], and the relevant [state law], and under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction" (25 USC 2710 [d][7][B][vii]; *see* 25 CFR part 291).

"Indian tribes have the exclusive right to regulate gaming

> activity on Indian lands if the gaming activity is not specifically prohibited by Federal law *and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity* " (emphasis added).

Based on the foregoing, as long as the proposed class III gaming activity is not prohibited by a state's criminal law and public policy, an Indian tribe can initiate the tribal-state compacting process under which a state is obligated to negotiate in good faith, subject to 25 USC 2710(d)(7). However, in the instant case, the commercialized casino gaming contemplated is prohibited under New York law and public policy. [FN19]

> FN19. Because the instant gaming activity is prohibited, the State is under no obligation to negotiate in good faith.

Because the proposed casino gaming is prohibited under the New York State Constitution and Penal Law, and such gaming conflicts with New York State's strong public policy against commercialized gambling, the Legislature did not have the power to enact the instant legislation authorizing the Governor to negotiate and enter into compacts with Indian tribes for the establishment of "for-profit" casino gaming in New York State. Moreover, IGRA does not and cannot force or require the Legislature to pass a law authorizing the Governor to execute agreements for the establishment of activity that is violative of New York State's laws and public policy. As indicated above, without valid legislative approval, the Governor can neither negotiate nor bind the State by entering into a compact.

New York's Prohibition Against Commercialized Gambling

New York prohibits commercialized gambling, including the

for-profit, casino gaming contemplated herein. This prohibition is set forth in the "Bill of Rights" of the New York State Constitution (*see* N.Y. Const., Article I, § 9). Article I, § 9 was adopted to "protect * * * the family man of meager resources from his own imprudence at the gaming tables" (*see International Hotels Corp. of Puerto Rico v Golden*, 15 N.Y.2d 9, 15 [1964] citing Carter and Stone, *Proceedings and Debates of the Convention*, 567 [Hosford, 1821]). Article I, § 9(1) of the New York State Constitution reads, in pertinent part:

" * * * except as hereinafter provided, *no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except* lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, *shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.*"(emphasis supplied).

Article I, § 9(2) provides:

" * * * any city, town or village within the state may by an approving vote of the majority of the qualified electors in such municipality voting on a proposition therefor submitted at a general or special election authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as:

(a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to

numbers or symbols selected at random;

(b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance."

Subdivision (2) further provides:

"If authorized, such games shall be subject to the following restrictions, among others which may be prescribed by the legislature:

(1) only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall be permitted to conduct such games;

(2) the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations;

(3) no person except a bona fide member of any such organization shall participate in the management or operation of such game; and

(4) no person shall receive any remuneration for participating in the management or operation of any such game."

Additionally, with respect to subdivision (2):

"Unless otherwise provided by law, no single prize shall exceed two hundred fifty dollars, nor shall any series of prizes on one occasion aggregate more than one thousand dollars. The legislature shall pass appropriate laws to effectuate the purposes of this subdivision [and] ensure that such games are rigidly regulated to prevent commercialized gambling."

Consistent with this provision, the Legislature has outlawed commercialized gambling (*see* Penal Law art 225). [FN20]

FN20. For example, Penal Law § 225.05 provides, "A

> person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity." Moreover, pursuant to Penal Law § 225.00(4), "A person 'advances gambling activity' when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation."

In order to give effect to Article I, § 9 of the New York State Constitution, the Legislature enacted Article 9-A of the General Municipal Law, New York's "Games of Chance Licensing Law" ("GML")(*see* GML § § 185 et seq.). The stated purpose of Article 9-A is consistent with New York's legal prohibition and strong public policy against commercialized gambling. GML 185, which sets forth the purpose of Article 9-A, provides, in pertinent part:

> " * * * The legislature hereby declares that the raising of funds for the promotion of bona fide charitable, educational, scientific, health, religious and patriotic causes and undertakings, where the beneficiaries are undetermined, is in the public interest. It hereby finds that, as conducted prior to the enactment of this article, games of chance were the subject of exploitation by professional gamblers, promoters, and commercial interests. *It is hereby declared to be the*

policy of the legislature that all phases of the supervision, licensing and regulation of games of chance and of the conduct of games of chance, should be closely controlled and that the laws and regulations pertaining thereto should be strictly construed and rigidly enforced; that the conduct of the game and all attendant activities should be so regulated and adequate controls so instituted as to discourage commercialization of gambling in all its forms, including the rental of commercial premises for games of chance, and to ensure a maximum availability of the net proceeds of games of chance exclusively for application to the worthy causes and undertakings specified herein; that the only justification for this article is to foster and support such worthy causes and undertakings, and that the mandate of section nine of article one of the state constitution, as amended, should be carried out by rigid regulations to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and prevent the diversion of funds from the purposes herein authorized" (GML 185)(emphasis added).

Similarly, the activities of the body charged with the administration of New York's Games of Chance Licensing Law, the New York State Racing and Wagering Board ("Board"), are consistent with New York's legal prohibition and strong public policy against commercialized gambling. GML 188-a(1) provides that the Board shall:

"Supervise the administration of the games of chance licensing law and [ ] adopt, amend and repeal rules and regulations governing the issuance and amendment of licenses thereunder and the conducting of games under such licenses, which rules and regulations shall have the force and effect of law and shall be binding upon all municipalities issuing licenses, and upon licensees of the board, to the end that such licenses shall be issued to qualified licensees only,

and that said games shall be fairly and properly conducted for the purposes and in the manner of the said games of chance licensing law prescribed and to prevent the games of chance thereby authorized to be conducted from being conducted for commercial purposes or purposes other than those therein authorized, participated in by criminal or other undesirable elements and the funds derived from the games being diverted from the purposes authorized, and to provide uniformity in the administration of said law throughout the state, the board shall prescribe forms of application for licenses, licensees, amendment of licenses, reports of the conduct of games and other matters incident to the administration of such law" (GML 183-a[1]) (emphasis added).

Likewise, GML 186(4) of Article 9-A, pertaining to the types of organizations authorized to conduct games of chance in New York State, reflects New York's strong public policy against commercialized gambling. GML 186(4) provides that:

" 'Authorized organization' shall mean and include any bona fide religious or charitable organization or bona fide educational, fraternal or service organization or bona fide organization of veterans or volunteer firemen, which by its charter, certificate of incorporation, constitution, or act of the legislature, shall have among its dominant purposes one or more of the lawful purposes as defined in this article, provided that each shall operate without profit to its members, and provided that each such organization has engaged in serving one or more of the lawful purposes as defined in this article for a period of three years immediately prior to applying for a license under this article."

It has been argued that the State Legislature had authority to enact Part B of Chapter 383 of the Laws of 2001 because: 1)

since New York allows what is ostensibly class III gaming for charitable and other purposes, New York must allow the commercialized, for-profit casino gaming at issue here; and 2) the citizens of New York State, by approving gambling for charitable and other purposes, have thereby approved class III commercialized casino gaming. This argument is unavailing because instead of focusing on whether the New York State Constitution authorizes the Legislature to pass a law authorizing the Governor to agree to bring about unconstitutional, commercialized gambling, this argument incorrectly focuses on the non-commercial gambling New York State permits as justification for the contention that New York State can enter compacts for the establishment of commercialized gambling facilities on Indian lands. Put another way, this argument fails to consider the plain language of Article I, § 9 of the State Constitution [FN21] and how this constitutional provision affects the Legislature's authority, or lack thereof, to enact legislation related to commercialized gambling.

> FN21. "When language of a constitutional provision is plain and unambiguous, full effect should be given to 'the intention of the framers * * * as indicated by the language employed" and approved by the People" (*Matter of King v. Cuomo,* 81 N.Y.2d 247 [1993]) (citations omitted). While it is true that "[t]he legislative power of this state shall be vested in the senate and assembly" (N.Y. Const., Article III, § 1), this Court has stated:
>
> "It needs no citation of authorities to sustain the postulate, that except as restrained by the Constitution, the legislative power is unfettered and supreme, and that a constitutional provision which withdraws from the cognizance of the legislature a particular subject, or

> which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject, leaves all other matters and incidents under its control. Nothing is subtracted from the sum of legislative power, except that which is expressly or by necessary implication withdrawn" (*In re Application of Thirty-Fourth St., Ry. Co.*, 102 N.Y. 343 [1886]).

As noted above, Article I, § 9 generally proscribes gambling except for lotteries where the net proceeds are applied towards education, pari-mutuel betting on horse races, [FN22] and games of chance to be engaged in by certain types of organizations (e.g., non-profit organizations) and conducted for specific, limited purposes (e.g., charitable). Under Article I, § 9, these games of chance are strictly regulated to ensure that they are not commercialized. For example, Article I, § 9 dictates where net proceeds go, who manages or operates the game, that no person shall be paid for participating in the management or operation of the game, and prize amounts. Further, Article I, § 9 provides that, "The legislature shall pass appropriate laws to effectuate the purposes of this subdivision [and] ensure that such games are rigidly regulated to prevent commercialized gambling." The legislation passed, pursuant to this constitutional directive, i.e., the Games of Chance Licensing Law, similarly seeks to "discourage commercialization of gambling in all its forms, including the rental of commercial premises for games of chance, and to ensure a maximum availability of the net proceeds of games of chance exclusively for application to [ ] worthy causes and undertakings" (GML 185). Based on the foregoing, Article I, § 9 of the New York State Constitution clearly prohibits gaming for commercialized purposes and commercialized games of chance, and further, acts as a limitation on the power of the

Legislature to enact laws pertaining to such gaming and games of chance. [FN23]

FN22. Under IGRA, this activity would be categorized as class III gaming. Because this specific activity is a constitutional exception set forth in Article I, § 9, the Legislature could enact a law authorizing the Governor to negotiate and ultimately enter into a compact with an Indian tribe only for the establishment of a facility where pari-mutuel betting on horse races would be conducted.

FN23. Because Article I, § 9 prohibits these activities, the Legislature is restrained from passing laws allowing such activities (*see e.g., Blue Cross and Blue Shield v. McCall,* 89 N.Y.2d 160 [1996]). Further, since Article I, § 9 does not set forth a procedure authorizing the Legislature to add further exceptions to it, it must be concluded that no such practice exists under this constitutional provision (*see e.g., Matter of King*, 81 N.Y.2d at 252). If no such practice exists, the Legislature may not legislate as if such practice does exist (*id.*).

Here, the Legislature, by enacting Part B of Chapter 383, authorized the Governor to execute tribal-state compacts for the establishment of up to six class III, for-profit casino gaming facilities on Indian lands and "after-acquired" lands pursuant to 25 USC 2719(b)(1)(A). There is no dispute, and the majority agrees, that the gaming facilities contemplated under this legislation (and the gaming and games to be engaged in at these facilities) are commercial in nature and fall squarely within the type of commercial gambling activity prohibited under Article

I, § 9. [FN24] Moreover, the provisions authorizing the execution of tribal-state compacts for the establishment of the above-mentioned prohibited facilities do not comport with Article I, § 9. [FN25] Thus, in view of the limitation on the Legislature's power set forth in Article I, § 9, and the axiom that where a constitutional limitation on the Legislature's power exists, a legislative enactment that seeks to exercise such power in spite of the limitation has no effect, the Legislature did not have the authority to enact Part B of Chapter 383 of the Laws of 2001.

FN24. The types of gaming and games ("Games") to be conducted at the for-profit casinos provided for under Part B of Chapter 383 are reflected in Appendix A to the instant Tribal-State Compact. As indicated above, the Compact was to be consistent with the June 20, 2001 MOU. According to the MOU, the types of gaming to be conducted are "those types of games already included in the Mohawk and Oneida gaming compacts." Thus, some of the games listed in the instant Tribal-State Compact, including baccarat, blackjack, craps and roulette are the same as those listed in the Mohawk Compact.

Regarding the games authorized under the Mohawk compact, the Third Department stated "*that the commercialized Las Vegas style gambling authorized by the compact is the antithesis of the highly restricted and 'rigidly regulated' (N.Y. Const., Art. 1, § 9[2]) forms of gambling permitted by the [New York State] Constitution and statutory law and New York's established public policy disfavoring gambling* (citations omitted)" (*Saratoga County*, 293 A.D.2d 20, 24, [3d Dept., 2002])(emphasis added).

FN25. Since Article I, § 9 limits the Legislature's ability to pass legislation to establish a prohibited commercialized gambling facility, it necessarily limits the Legislature's ability to pass legislation authorizing the State to enter into an agreement for the establishment of a prohibited commercialized gambling facility.

In light of this conclusion, that the Legislature had no power to enact the legislation, the next question that must be answered is whether IGRA somehow grants the Legislature the authority to enact Part B of Chapter 383. Respondents' main argument that the Legislature had the authority to enact Part B of Chapter 383 is that because the New York State Constitution permits charitable and other organizations to conduct non-commercial casino-style gaming in New York State, IGRA requires that New York must negotiate with Indian tribes to give them the opportunity to conduct commercial casino-style gaming. In support of this argument, respondents rely primarily on IGRA's legislative history regarding the "for any purpose by any person" provision relating to class II gaming (S.Rep. No. 100-446, 100th Cong., 2d Sess., Explanation of Major Provisions, at 12), [FN26] and *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir.1990)(cited for the proposition that IGRA's "legislative history reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state merely regulated, as opposed to completely barred, that particular gaming activity")(*id.* at 365). Based on the foregoing, respondents concluded that "a State may not invoke state law prohibiting commercialized Class III gaming outside Indian lands to justify a refusal to undertake compact negotiations under IGRA. To the

contrary, as long as a State permits Class III gaming 'for any purpose by any person,' IGRA expressly requires States to 'negotiate * * * in good faith to enter into * * * a compact' and provides specific remedies where they fail to do so" (*see* State's Brief at 44; regarding the remedies, *see* 25 USC 2710[d]). [FN27]

FN26. According to IGRA's legislative history, "The phrase 'for any purpose by any person, organization or entity' makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming."

FN27. Respondents' argument, although supported by IGRA's legislative history, leads to an odd result. In *Cabazon,* the Supreme Court upheld a similar argument. However, Justice Stevens had reservations akin to my own, i.e., that the argument makes little sense. In a dissenting opinion, written by Justice Stevens and joined by Justice O'Connor and Justice Scalia, Justice Stevens wrote that:
"Today the Court seems prepared to acknowledge that an Indian tribe's commercial transactions with non-Indians may violate 'the State's public policy.' * * *. The Court reasons, however, that the operation of high-stakes bingo games does not run afoul of California's public policy because the State permits some forms of gambling and, specifically, some forms of bingo. I find this approach to 'public policy' curious, to say the least.

> The State's policy concerning gambling is to authorize certain specific gambling activities that comply with carefully defined regulation and that provide revenues either for the State itself or for certain charitable purposes, and to prohibit all unregulated commercial lotteries that are operated for private profit. To argue that the tribal bingo games comply with the public policy of California because the State permits some other gambling is tantamount to arguing that driving over 60 miles an hour is consistent with public policy because the State allows driving at speeds of up to 55 miles an hour" (*Cabazon,* 480 U.S. at 224-25).

The IGRA provisions and case law cited by respondents do not provide authorization for this State's Legislature to enact laws like Part B of Chapter 383. IGRA presupposes that the New York State Legislature has the authority to enact such laws. [FN28] However, nothing in IGRA, not the fact that IGRA preempts the field in the area of gaming on Indian lands, not the IGRA-defined role of states in the regulation of gaming on Indian lands, [FN29] not the requirement that states negotiate compacts in good faith, not the fact that the compact requirement is meant to take into account the interests of the tribe and state, not the fact that the Secretary of the Interior has the power to impose commercialized casino gambling if a compact is not entered into, counters the Article I, § 9 limitation to the Legislature's power to enact legislation authorizing the State, through the Governor, to execute an agreement for the establishment of unconstitutional, illegal commercialized gambling. Put another way, state law, not federal law, necessarily governs the exercise of the Legislature's power to enact legislation . [FN30]

FN28. One problem with IGRA presupposing that a particular state has the authority to enact legislation similar to Part B is that no two states have exactly the same history regarding gambling or motivations behind why all, some or no gambling is proscribed, or why a particular state chose to prohibit gambling via statute, city ordinance or Bill of Rights provision.

FN29. Indian nations are sovereign and IGRA allows states, through the compacting process, to gain a measure of control over gaming on Indian lands (*see Seminole Tribe*).

FN30. IGRA's focus is on the compact requirement, not on a legislature's power, or lack thereof, to enact legislation in a given area. Similarly, this Court's decision in *Saratoga County* focused on whether the Governor had authority to compact, rather than on whether the Legislature's ability to legislate was thwarted by a constitutional limitation.

IGRA states that "Class III gaming activities shall be lawful on Indian lands only if such activities are located in a State that permits such gaming for any purpose by any person, organization or entity" (25 U.S.C. [d][1][A][ii]). Applying Justice Steven's reasoning to the instant case, it does not follow that if a state permits Class III gaming for charitable purposes, it must permit commercial gambling on Indian lands by way of a compact in violation of a State's own constitutional provision (*California v. Cabazon,* 480 U.S. at 222 -227, Justice Stevens dissenting). At most, the State would be required to permit Class III gaming on Indian lands for charitable purposes. Such an interpretation would not violate the New York State

Constitution. Nothing in IGRA requires the contrary. Moreover, the Constitution can be amended by the People of the State of New York.

Mashantucket Pequot Tribe v. State of Connecticut (737 F.Supp. 169 [1990], aff'd 913 F.2d 1024 [1990]) and *California v. Cabazon Band of Indians* (480 U.S. 202, supra), two cases heavily relied on by respondents, do not change this conclusion because these cases are neither controlling nor applicable. In *Mashantucket*, the Pequot Tribe sought to enter into negotiations with the State of Connecticut to conduct casino-type games of chance on its reservation. Connecticut's statutory scheme generally prohibited commercial gambling but permitted non-profit organizations to conduct "Las Vegas nights" and games of chance to raise funds for the organizations. At the heart of the *Mashantucket* decision was the conclusion of both the district court and the Second Circuit that Connecticut regulated rather than prohibited gambling and thus Connecticut was required to negotiate a compact with the Pequot Tribe. On the other hand, the instant case involves Article I, § 9 of the New York State Constitution, a provision which reflects New York's long-standing policy against the type of commercialized gambling sought to be permitted here *and* acts as a limitation on the Legislature's authority to enact legislation like Part B of Chapter 383. (*See* discussion of New York's long constitutional history of prohibiting gambling in *Saratoga v County Chamber of Commerce, Inc. v. George Pataki, Governor of the State of New York* (100 N.Y.2d 802, 826-828, G.B. Smith concurring in part and dissenting in part). The anti-gambling provision is part of the supreme law of the State and can only be repealed by the People of New York State by amending the constitution (*see* N.Y. Const., Article XIX, § 1). The New York State Constitution should be accorded

significantly more deference than the statutes at issue in *Mashantucket,* statutes which did not reflect as strong an anti-gambling policy as New York's and have since been repealed.

With respect to *Cabazon,* it should be noted that while IGRA has adopted *Cabazon* language pertaining to class II and class III gaming, on the facts and primary issue to be resolved, *Cabazon* can be distinguished from the instant case. First, unlike the instant case, *Cabazon* involved a state (i.e., California) that did not have as clear an anti-gambling policy as New York. Second, *Cabazon* involved an Indian tribe's attempt to operate bingo parlors which, under IGRA, falls under class II gaming and within Tribal jurisdiction with oversight regulation by the National Indian Gaming Commission. Moreover, the Senate Report which accompanied the bill that eventually became IGRA (i.e., IGRA's legislative history) links language from *Cabazon,* i.e., the regulatory/prohibitory distinction, to class II gaming while remaining silent as to class III gaming, the gambling activity at issue here. Given this and the fact that class II and class III gaming are regulated in very different ways, Congress contemplated different treatment for class II and class III gaming. Third, *Cabazon* involved an analysis of: 1) whether a statute and county ordinances addressing gambling were criminal (i.e., prohibitory) or civil (i.e., regulatory); and 2) whether California could enforce its gambling laws on Indian land. The instant case considers whether the Legislature has the authority to enact legislation that is in direct contravention to the New York State Constitution.

Thus, in view of the plain and unambiguous limitation on legislative authority set forth in Article I, § 9 of the New York State Constitution, the State legislature did not have the

authority to enact Part B of Chapter 383 of the Laws of 2001. Further, neither IGRA nor any reading of *Mashantucket* and *Cabazon* could grant the Legislature such authority. Accordingly, Part B of Chapter 383 must be set aside as void and unconstitutional, including Executive Law § 12 (regarding Governor's authority to enter into tribal-sate compacts) and the amendments to Penal Law § 225.30(a)(1),(b)(regarding the legalization of slot machines for class III gaming purposes).

In affirming the lower court's holding regarding Part B of Chapter 383, and thereby disregarding the Article I, § 9 limitation on the Legislature, the majority has essentially concluded that IGRA provides a means for the Legislature to circumvent this State's constitutional limitations and pass legislation that it normally could not. This conclusion suggests, at least with regard to gaming on Indian lands, that IGRA exerts control over how legislation is passed and even supplants this State's Constitution. In view of New York State's status as a sovereign state and the fact that New York State's Constitution is the supreme law of the state, this notion is incorrect.

Moreover, effectively extending power to IGRA, with regard to the State's Constitution, is improper because the people of New York State, not Congress or the Secretary of the Interior or the State Legislature, approve the State Constitution and any amendments thereto (*see* N.Y. Const., Article XIX, § 1). Thus, if the people are not permitted to consider and vote on a subject covered under the State Constitution, their constitutional rights have been violated.

For example, the people have approved certain exceptions to the State's general ban on gambling, as well as highly regulated, non-commercial games of chance authorized under Article I, §

9 of the New York State Constitution and Article 9-A of the General Municipal Law. [FN31] However, the high-stakes commercialized gaming and games contemplated under Part B of Chapter 383 was not approved by the people. [FN32] In other words, the Legislature, by purporting to make a policy decision within its power, i.e. enacting Part B, delegated to the Governor the authority to execute tribal state compacts, authority that, pursuant to the limitation on legislative power set forth in Article I, § 9, the Legislature does not have. Accordingly, Part B is not an improper delegation of legislative authority as plaintiffs contend. This implies that the Legislature had the authority to enact Part B. Instead, because the Legislature does not have the authority to empower a state official to enter into an agreement for the establishment of commercialized gambling, the Legislature's "delegation" was an action without consequence.

FN31. General Municipal Law § 186(3) provides:
" 'Games of chance' shall mean and include only the games known as "merchandise wheels", "coin boards", "merchandise boards", "seal cards", "raffles", and "bell jars" and such other specific games as may be authorized by the board, in which prizes are awarded on the basis of a designated winning number or numbers, color or colors, symbol or symbols determined by chance, but not including games commonly known as "bingo or lotto" which are controlled under article fourteen-H of this chapter and also not including "bookmaking", "policy or numbers games" and "lottery" as defined in section 225.00 of the penal law. No game of chance shall involve wagering of money by one player against another player."
The Board has authorized other "games of chance"

including: 1) Craps; 2) Roulette; 3) Black Jack; 4) Big Six; 5) Big Nine; 6) Money Wheel; 7) Color Wheel; 8) Merchandise Wheels; 9) Chuck-A-Luck; 10) Hazard; 11) Under and Over Seven; 12) Beat the Dealer; 13) Bang; 14) Joker Seven; 15) Horse Race Wheel; 16) Best Poker Hand; 17) Bell Jar; 18) Fruit Wheel; 19) Card Wheel; and 20) Raffles (*see* 9 NYCRR § § 5620.3--5620.22).

FN32. For example, Black Jack, a regulated, "authorized game of chance" (*see* 9 NYCRR 5620.5), that was approved by the people of New York, is materially different from the game played at the Seneca Niagara Casino. One major difference is the maximum bet amount. The maximum bet for the "authorized" game is $5.00 or its equivalent in chips (*id.*). Meanwhile the maximum bet for the "same" game at the Seneca Niagara Casino is $2,500.00, 500 times the amount of the regulated, "authorized" game (*see* Park Place Brief at 24). It is clear that the people of New York State did not approve "this" game of Black Jack.

Although under GML § 186(3), other games of chance may be authorized by the Board, the following games, included in the instant Tribal-State Compact, have not been authorized as "games of chance" under New York law: 1) Baccarat; 2) Carribean Stud Poker; 3) Keno; 4) Let It Ride Poker; 5) Minibaccarat; 6) Pai bow poker; 7) Color Wheel 8) Red Dog; 9) Sic Bo; 10) Super Pan; 11) Casino War; 12) Spanish Black Jack; 13) Multiple Action Black Jack; and 14) Three Card Poker. These games are not permitted to be engaged in for any purpose by any person, organization or entity (*see* 25 USC 2710[d][1][B]). Accordingly, even if New York State could

legally enter into a tribal-state compact, it could refuse to negotiate with the Seneca Nation of Indians regarding the Tribe's operation of these unauthorized games (*see* e.g., Cheyenne River Sioux Tribe v. State of South Dakota, 3 F3d 273 [8th Cir.1993]). Note also that New York State can refuse to negotiate if the Seneca Nation of Indians wants to operate a game that is a variation of the authorized game (*id.*). Moreover, in light of the Article I, § 9 limitation to the Legislature's power, the subject matter of Part B of Chapter 383 clearly falls within the ban on commercialized gaming.

This legislation, specifically the portions authorizing the execution of compacts, should first have been put through the amendment process so that the people of New York State could decide whether such compacts for the establishment of high-stakes games or gaming should become permissible under the State Constitution and whether the Legislature can enact legislation authorizing the execution of such compacts. Because the high-stakes commercialized gaming and games, and the provisions regarding the compacts were not put before the people through the amendment process, the rights of New York's citizens have been violated.

Affirming Part B presents another problem regarding the ability of the people to exercise their collective voice. During oral argument, State respondent conceded that theoretically, there would be no legal impediment to having casinos placed in New York City and Albany as long as the requirements regarding after-acquired Indian lands held in trust for an Indian tribe (25 USC 2719[b][1][A]) are met, specifically, if the Secretary of the Interior: 1) purchases land in, for example, New York City and Albany and holds it in trust for Indian tribes; and 2) determines that a gaming establishment(s) on the newly

acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community; and 3) the Governor concurs, there could be commercialized Indian gaming in New York City and Albany without the required approval, via the amendment process, of the people of the State of New York.

CONCLUSION

Contrary to the majority's position, Part B of Chapter 383 is not a duly enacted statute because, given the Article I, § 9 limitation on the Legislature's ability to enact legislation empowering the Governor to enter an agreement for the establishment of commercialized gambling, the Legislature did not have the authority to enact Part B. Put another way, since New York's Legislature does not have the constitutional or statutory authority to enact legislation to establish commercialized gambling, it certainly cannot enact legislation empowering the Governor to execute compacts for the sole purpose of establishing casinos where commercialized gambling will take place.

The majority made a number of points pertaining to the control a state can exert on Indian lands and the validity of games under a gaming compact, i.e., it noted that, under IGRA, state laws prohibiting commercialized gambling do not apply on Indian lands, that a state enjoys more regulatory control over Indian casino gaming than it would ordinarily, and further, that regarding such gaming, "state involvement and regulation is to be favored." However, these points do not consider the step that necessarily precedes the Governor's negotiation and entering of Indian gaming compacts, i.e., the legislative authorization held to be necessary under *Saratoga County*. Regarding this step, the

majority states that under *Saratoga County*, negotiating and entering compacts involve policy decisions within the power of the Legislature (*see* majority opinion at 19; *Saratoga County*, 100 N.Y.2d at 82-23). However, this decision did not consider that the Legislature is subject to a constitutional limitation that prohibits it from enacting the type of legislation at issue here. In other words, it is clear, given the constitutional and statutory limitations on the Legislature's power to enact laws in furtherance of commercial gambling, that passing laws in that area cannot be considered an example of a policy decision within the power of the Legislature. Since passing laws establishing commercialized gambling is not a policy decision within the power of the Legislature, the Legislature's enactment of Part B of Chapter 383 cannot stand. [FN33] Also, as New York State is sovereign in its own right, Congress, through IGRA, cannot dictate what areas the Legislature can legislate in or direct the Legislature to take action that it could not ordinarily take, especially when the legislation that results from such dictation or direction would be in direct contravention with a constitutional limitation on the Legislature's authority to act in a given area. Moreover, Article I, § 9 was approved by the people of the State of New York as a general prohibition against gambling, with certain exceptions, and as a limitation on the Legislature's general right to legislate. IGRA cannot supplant that constitutional provision because that would necessarily mean the rights and interests that IGRA is most concerned with protecting, i.e., those of the Indian tribes, outweigh the will of the people of New York State.

> FN33. IGRA was meant to preempt the field regarding the governance of gaming activities on Indian lands. Further, a main thrust of IGRA is that if a state allows a certain type of gaming conduct for any purpose, a state

must allow Indian tribes to engage in such gaming conduct on Indian lands for any purpose. These key concepts speak to whether a state law prohibition against a certain kind of conduct can apply on Indian lands, not whether the Legislature may pass laws in a given area.

Finally, in *Alden v. Maine* (527 U.S. 706, 748, 758; 119 S.Ct. 2240; 144 L.Ed. 636 (1999), a case which held that Congress could not require that a State be sued in a State Court, the Supreme Court stated:

> Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation. * * * Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States."

According to the *Alden* decision, Congress could not negate a New York State constitutional policy that goes back over three centuries. Moreover, Congress, through IGRA, did not negate or intend to negate that policy. Rather than submit to such an interpretation, until the Supreme Court rules otherwise, this Court should adhere to the clear mandate of the New York State Constitution.

Based on the foregoing, Part B of Chapter 383 should be held as void, illegal and unconstitutional, any compact(s), entered into pursuant to Part B of Chapter 383, should be held as void and unenforceable, any casinos opened and operating pursuant to such a compact should be declared unable to continue operations and the Governor and other New York State officials should be declared unable to engage in activities in furtherance of Part B of Chapter 383. Further, I would reverse the lower court decision granting summary judgment on that portion of appellants' complaints pertaining to Part B of Chapter 383 and reinstate those causes of action.

In this case, the Governor and the Attorney General, as is their right, have seen their duty as requiring them to forego the New York State Constitution and apply a federal statute. Normally they would be advocates for the State Constitution. The result is to leave the People of the State of New York without a State advocate for a provision in its Bill of Rights. Perhaps, this Court or the Attorney General should have appointed one. In any case, while it is clear that the Federal government has preempted the field in how gaming is to be conducted on Indian lands, it does not follow that preemption forces New York to have its Governor and Legislature approve commercial gambling in spite of the New York State Constitution. Nothing in IGRA requires New York to set up commercial gambling on Indian lands or on lands acquired by Indians.

Because I do not agree with the majority's holding regarding Part B of Chapter 383 of the Laws of 2001, I dissent.

R.S. SMITH, J. (dissenting).

I dissent from the majority's holding that Part C of chapter 383

is constitutional, and would affirm the Appellate Division's holding that it is not. The requirement of article I, § 9 of the Constitution that the net proceeds of a lottery "shall be applied exclusively to or in aid or support of education" can be too easily evaded if the Legislature may require vendors to spend a portion of the funds they receive from the lottery for non-educational purposes of the Legislature's choosing.

The statute as originally enacted provided for a "vendor's fee" to racetracks of between 12% and 25% of the revenue remaining after payment of prizes, and required the vendors to "reinvest" between 35% and 45% of that fee in enhanced purses and a breeding fund. In other words, the Legislature required that between 4.2% and 11.25% of after-prize revenue be devoted to increasing racetrack prizes and breeding horses-not to the "aid or support of education." The Legislature could not have appropriated lottery funds for racetrack purses or horse breeding, and should not be allowed to accomplish the same end by directing vendors to "reinvest."

To me, the issue is that simple. It is not relevant that, as the majority notes, other statutes direct racetracks to divert some of their income to purses and breeding funds (opinion at 28-29); the income to which those statutes apply is not lottery income and is not subject to the "exclusively to education" restriction of article I, § 9. Nor is it relevant that the maximum vendor's fee under part C was increased from 25% to 29% of revenue remaining after prizes (opinion at 31); the reinvestment was included in both fee levels, so the increase proves nothing about whether the reinvestment had the effect of inflating the fee.

The essence of the majority's position is that plaintiffs have not proved that the reinvestment is a device to thwart the

constitutional limitation. The majority suggests that the vendor's fee called for by the statute is not inflated by the required reinvestments--that the fee may be the lowest a vendor would take in any event, and that the reinvestments may be expenditures the racetracks would make anyway. The majority also says that "the Legislature was entitled to determine" that the reinvestment expenditures are a reasonable way to enhance racetrack attendance, and that increased attendance will in turn increase lottery revenues (opinion at 29-30).

I agree that plaintiffs have not proved that the reinvestment provisions of part C were designed to evade the constitutional requirement; it is very hard to prove such evasion, or to disprove it. I also agree with the majority that "[i]t is generally not for the courts to determine whether a particular vendor's fee ... is reasonable" (opinion at 30); indeed, it will usually be impossible for courts to do so. That is precisely why a "reinvestment" requirement offers a temptation to a Legislature that wants to escape the constitutional restriction. Indeed, in saying that it "can perhaps imagine" a case where a "flagrant end-run" around the constitutional requirement would be invalidated (opinion at 30-31), the majority seems to sanction in advance any end run that falls short of being flagrant. I find this too lax an approach to the enforcement of article I, § 9, and I think we should hold simply that no legislatively-directed diversions of funds from lottery vendor's fees to non-educational purposes are allowed.

* * *

Order modified, with costs to defendants, by declaring Part C of Chapter 383 of the Laws of 2001 constitutional and, as so modified, affirmed.

Chief Judge KAYE and Judges ROSENBLATT, GRAFFEO and READ concur.

Judge G.B. SMITH dissents in part and votes to modify by declaring Part B of Chapter 383 of the Laws of 2001 unconstitutional in an opinion.

Judge R.S. SMITH dissents in part and votes to affirm in an opinion in which Judge G.B. SMITH concurs insomuch thereof as pertains to Part C of Chapter 383 of the Laws of 2001.

APPENDIX B

Appendix B – Opinion And Order Of The New York State Supreme Court, Appellate Division, Third Department Entered July 7, 2004

Supreme Court, Appellate Division, Third Department, New York.

Joseph DALTON et al., Appellants,

v.

George PATAKI, as Governor of the State of New York, et al., Respondents.

(Action No. 1.)

Lee Karr, Appellant,

v.

George Pataki, as Governor of the State of New York, et al., Respondents.

(Action No. 2.)

July 7, 2004.

Before: CARDONA, P.J., MERCURE, PETERS, SPAIN and CARPINELLO, JJ.

MERCURE, J.

Appeal from an order of the Supreme Court (Teresi, J.), entered July 17, 2003 in Albany County, which granted defendants' cross motions for summary judgment dismissing the complaints and declared parts B, C and D of chapter 383 of the Laws of 2001 constitutional as challenged.

These consolidated actions have their roots in a prior Court of Appeals decision holding that defendant Governor lacks the authority to unilaterally execute tribal-state compacts with

Indian tribes to allow casino gaming on Indian reservations (*see Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047 [2003], *cert. denied* **52 540 U.S. 1017, 124 S.Ct. 570, 157 L.Ed.2d 430 [2003]). The Court concluded that the negotiation of such compacts involves issues affecting the health and welfare of state residents, implicating policy choices that lie solely within the province of the Legislature (*id.* at 822-823, 766 N.Y.S.2d 654, 798 N.E.2d 1047). [FN1] In 2001, the Legislature enacted a bill which, among other things, authorizes the Governor to enter into four tribal-state compacts for the operation of casino gaming *66 activities at up to six facilities on Indian lands (*see* L. 2001, ch. 383, part B) pursuant to the Indian Gaming Regulatory Act (25 USC § § 2701-2721; 18 USC § § 1166-1168) (hereinafter IGRA). As relevant here, part C of the law also permits the Division of the Lottery (hereinafter Division) to license and implement the operation of video lottery gaming at several pari-mutuel racetracks; part D of the law authorizes the Division to participate in a multistate lottery.

FN1. The Court also concluded that Indian tribes are not indispensable parties to litigation challenging the Governor's authority to enter into tribal-state compacts (*Saratoga County Chamber of Commerce v. Pataki, supra* at 819-822, 766 N.Y.S.2d 654, 798 N.E.2d 1047). Although defendants argue that the decision was incorrect, their petition for a writ of certiorari has been denied (*Pataki v. Saratoga County Chamber of Commerce*, 540 U.S. 1017, 124 S.Ct. 570, 157 L.Ed.2d 430 [2003]). Therefore, we do not address defendants' argument that the tribes are indispensable parties in this action.

Plaintiffs, a group of citizen taxpayers, two state legislators, nonprofit organizations and an unincorporated association opposed to the spread of gambling, commenced these actions seeking a judgment declaring parts B, C and D of chapter 383 of the Laws of 2001 to be unconstitutional. Supreme Court granted defendants' cross motions for summary judgment dismissing the complaints and declared that parts B, C and D are constitutional and in conformance with federal law. Plaintiffs now appeal, asserting that these provisions violate N.Y. Constitution, article I, § 9, which generally bans gambling in the state with certain exceptions. Plaintiffs argue in the alternative that parts B, C and D were enacted in violation of the "message of necessity" provision of the N.Y. Constitution, which requires that a bill in final form be on legislators' desks for "at least three calendar legislative days [before] final passage, unless the governor * * * shall have certified, under his or her hand and the seal of the state, the facts which in his or her opinion necessitate an immediate vote thereon" (N.Y. Const., art. III, § 14).

Addressing the latter argument first, we conclude that the Governor's message of necessity satisfied the constitutional obligation. The message of necessity indicates that "[b]ecause the bills have not been on your desks in final form for three calendar legislative days, the Leaders of your Honorable Bodies have requested this message to permit their immediate consideration." It states that the "facts necessitating an immediate vote on the bills" are that the "bills are necessary to enact certain provisions of law."

Although the message is brief, we note that "[i]t is the Governor who must express the opinion that an immediate vote is desirable. The facts on which [the Governor] forms that

opinion must satisfy [him or her]" (*Finger Lakes Racing Assn. v. New York State Off-Track Pari-Mutuel Betting Commn.*, 30 N.Y.2d 207, 219, 331 N.Y.S.2d 625, 282 N.E.2d 592 [1972], *appeal dismissed* 409 U.S. 1031, 93 S.Ct. 525, 34 L.Ed.2d 481 [1972]). Here, the message of necessity is reasonable and conforms to other such messages that have been upheld in the past (*see Norwick v. Rockefeller*, 70 Misc.2d 923, 931-934, 334 N.Y.S.2d 571 [1972], *affd. no op.* 340 A.D.2d 956, 338 N.Y.S.2d 384 [1972], *affd. no op.* 33 N.Y.2d 537, 347 N.Y.S.2d 435, 301 N.E.2d 422 [1973] [upholding a message of necessity that stated "[b]ecause the bill in its final form has not been on your desks three calendar legislative days the Leaders of your Honorable bodies have requested this message to permit its immediate consideration"]; *see also Finger Lakes Racing Assn. v. New York State Off-Track Pari-Mutuel Betting Commn., supra* at 219-220, 331 N.Y.S.2d 625, 282 N.E.2d 592; *Matter of Joslin v. Regan*, 63 A.D.2d 466, 468-469, 406 N.Y.S.2d 938 [1978], *affd.* 48 N.Y.2d 746, 422 N.Y.S.2d 662, 397 N.E.2d 1329 [1979]). We note that "[t]he Legislature could [have said that] the time for consideration was too short. It did not say that, but accepting the Governor's certificate and considering the proposal in the time available, it passed it" (*Finger Lakes Racing Assn. v. New York State Off-Track Pari-Mutuel Betting Commn., supra* at 220, 331 N.Y.S.2d 625, 282 N.E.2d 592). Given that the message of necessity "literally and reasonably conforms with [the] constitutional requirements" (*id.* at 220, 331 N.Y.S.2d 625, 282 N.E.2d 592), we will not intervene to nullify the act.

Turning to the substance of plaintiffs' arguments, we will first address plaintiffs' challenges to part B of chapter 383 of the Laws of 2001. As explained in depth below, IGRA both "preempts the field in the governance of gaming activities on

Indian lands" (S. Rep. No. 100-46, 100th Cong., 2d Sess., at 6, reprinted in 1988 U.S. Code Cong. & Admin. News, at 3071) and sets forth a mechanism by which states may exert some measure of control over gambling on Indian lands (*see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58, 116 S.Ct. 1114, 134 L.Ed.2d 252 [1996]). We determine that, pursuant to IGRA, a state may enter into tribal-state compacts permitting particular class III, casino-type gaming activities on tribal lands if the state permits any person to conduct those particular gaming activities for any purpose, including a charitable purpose. That a compact permits a certain game to be conducted in a manner that is otherwise inconsistent with state law will not render it invalid if the game is not completely prohibited. Because New York permits the gaming activities at issue here for charitable purposes, subject to heavy regulation, the gaming is properly the subject of a tribal-state compact.

Next, regarding part C of chapter 383 of the Laws of 2001, we conclude that video lottery gaming, as implemented by the Division, constitutes a valid, state-operated lottery and, thus, falls within the exception of such lotteries from the general ban on gambling in N.Y. Constitution, article I, § 9(1). We agree with plaintiffs, however, that the requirement *68 in part C that a portion of video lottery terminal (hereinafter VLT) vendor fees be dedicated to breeding funds and enhanced purses violates the constitutional mandate that "the net proceeds" of state-operated lotteries "be applied exclusively to or in aid or support of education in this state as the [L]egislature may prescribe" (N.Y. Const., art. I, § 9[1]). Moreover, we find that severing the portion of part C directing reinvestment does not cure the constitutional defect because severance would result only in an inflated vendor fee. Thus, while we conclude that video lottery gaming itself is a "lottery" within the meaning of

N.Y. Constitution, article I, § 9, we must modify Supreme Court's order to declare the entirety of part C of chapter 383 to be unconstitutional due to the impermissible revenue distribution scheme set forth therein.

Finally, we conclude that plaintiffs' challenges to part D of chapter 383 of the Laws of 2001 are meritless. New York retains sufficient control over the operation **54 of the multistate lottery within its borders to meet the constitutional requirement that lotteries be "operated by the state" (N.Y. Const., art. I, § 9[1]). Contrary to plaintiffs' further argument, the net proceeds generated by the multistate lottery remain in New York and are dedicated "exclusively to or in aid or support of education in this state" as required by N.Y. Constitution, article I, § 9(1). Thus, part D is constitutional.

Although plaintiffs also advance a number of policy-laden arguments before us, courts are not concerned with questions of legislative policy. While we determine that parts B and D of chapter 383 are constitutional and, generally speaking, video lottery may constitute a valid lottery within the meaning of that term in N.Y. Constitution, article I, § 9, our inquiry in this case is limited to the constitutionality of the challenged legislation.

I. *Tribal-State Compacts*

An understanding of both this state's historical approach to gambling, as well as the legislative history of IGRA and its interplay with state law, is essential to an analysis of the issues raised in connection with part B of chapter 383 of the Laws of 2001. Accordingly, we first examine the statutory and constitutional background of the case and then address the merits of plaintiffs' challenge to part B.

A. *IGRA*
1. *Statutory Provisions*

The stated purpose of IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments" (25 USC § 2702[1]). The statute also provides a federal regulatory framework to shield such gaming "from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly" (25 USC § 2702[2]; *see* 25 USC § 2702[3]). Congress enacted IGRA upon a finding that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by [f]ederal law and is conducted within a [s]tate which does not, as a matter of criminal law and public policy, prohibit such gaming activity" (25 USC § 2701[5]).

The statute divides gaming into three categories that are subject to differing levels of regulatory oversight depending on the type of gaming within each category. Class I gaming consists of "social games solely for prizes of minimal value or traditional" tribal games (25 USC § 2703[6]). Class I gaming on Indian lands [FN2] is within the exclusive jurisdiction of Indian tribes (25 USC § 2710[a][1]). Class II gaming **55 includes bingo and card games that are either expressly authorized or not explicitly prohibited by the state and legally played in the state (25 USC § 2703[7][A]). Class II gaming is defined to exclude "any banking card games, including baccarat, chemin de fer, or blackjack (21), or * * * electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" (25 USC § *702703 [7][B]). Class II gaming on Indian lands

is within the jurisdiction of the Indian tribes, subject to the provisions of IGRA, if "such Indian gaming is located within a [s]tate that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by [f]ederal law)" (25 USC § 2710 [b][1][A]; *see* 25 USC § 2710[a][2]).

> FN2. The term "Indian lands" is defined as "all lands within the limits of any Indian reservation[,] and * * * any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power" (25 USC § 2703[4]). Gaming on lands acquired after October 17, 1988 by the Secretary of the Interior and held in trust for the benefit of an Indian tribe--other than land within or contiguous to a reservation--is sharply curtailed (*see* 25 USC § 2719[a]). As relevant here, gaming is permitted on after-acquired lands only if the Secretary finds, after consultation, that such gaming "would be in the best interest of the Indian tribe [and] would not be detrimental to the surrounding community," and the governor of the state concurs with the Secretary's determination; or the lands are taken in trust as part of (i) a land claim settlement, (ii) an initial reservation, or (iii) the restoration of Indian lands (25 USC § 2719[b][1][B]).

Class III gaming, the type of gaming permitted by part B of chapter 383, is defined as "all forms of gaming that are not class I gaming or class II gaming" (25 USC § 2703[8]). Class III

gaming is the most heavily regulated of the three categories of gaming and is lawful on Indian lands only if three conditions are met. First, the gaming activities must be authorized by an ordinance or resolution of the governing body of the Indian tribe (*see* 25 USC § 2710[d][1][A][i]). Second, like class II gaming, class III gaming activities are permitted on Indian lands "only if such activities are * * * located in a [s]tate that permits such gaming for any purpose by any person, organization, or entity" (25 USC § 2710[d][1][B]). Finally, class III gaming must be "conducted in conformance with a [t]ribal-[s]tate compact entered into by the Indian tribe and the [s]tate" (25 USC § 2710[d][1] [C]). The compacting requirement "allows states to negotiate with tribes that are located within their borders regarding aspects of class III Indian gaming that might affect legitimate state interests" (*Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 716 [2003]; *see* 25 USC § 2710[d][3] [C]). Although states are required under IGRA to negotiate in good faith upon receiving a request to enter into negotiations with an Indian tribe (*see* 25 USC § 2710[d][3][A]), nothing in the statute compels a state to *accept* a proposed compact (*see* 25 USC § 2710[d][7][B][vii] [describing the procedure to be followed by the Secretary of the Interior to permit class III gaming on state lands where a state does not consent to a compact]; 25 CFR part 291 [same]). Moreover, compacts will take effect only if approved by the Secretary of the Interior (*see* 25 USC § 2710[d][3][B]).

Here, plaintiffs assert that while state laws, including constitutions, do not normally apply on Indian lands because Congress has exclusive authority over Indian affairs unless it vests such power in the states (*see McClanahan v. State Tax Commn. of Arizona*, 411 U.S. 164, 170-171, 93 S.Ct. 1257, 36 L.Ed.2d 129 [1973]), IGRA provides that *all* state laws

regarding gambling apply on Indian lands. Specifically, plaintiffs note that IGRA makes "all [s]tate laws *71 pertaining to the licensing, regulation, or prohibition of *gambling*, including but not limited to criminal sanctions applicable * * * in Indian country in the same manner and to the same extent as such laws apply elsewhere in the [s]tate" (18 USC § 1166[a] [emphasis added]). Plaintiffs' argument fails, however, because the term "gambling" *excludes* "class III gaming conducted under a [t]ribal-[s]tate compact approved by the Secretary" (18 USC § 1166[c] [2]). That is, under 18 USC § 1166, state laws regulating gambling do not apply to class III gaming otherwise permitted under IGRA. Class III gaming is allowed on Indian lands by IGRA if, as relevant here, it is " conducted in conformance with a [t]ribal-[s]tate compact" (25 USC § 2710[d] [1][C]) and "in a **56 [s]tate that *permits such gaming for any purpose by any person, organization, or entity* " (25 USC § 2710[d][1][B] [emphasis added]).

Plaintiffs argue in the alternative that New York does not "permit [ ] such gaming"--i.e., casino gambling--and, thus, the condition contained in 25 USC § 2710(d)(1)(B) is not met here. Plaintiffs point to a ban on commercialized gambling--as opposed to gambling for charitable purposes--in N.Y. Constitution, article I, § 9 as evidence that New York does not permit the type of casino gaming that is to be authorized in the four tribal-state compacts contemplated by part B of chapter 383. Defendants counter that because the N.Y. Constitution permits class III gaming for some purposes, New York cannot unilaterally prohibit such gaming on Indian lands. Indisputably, the term "permits such gaming for any purpose by any person, organization, or entity" defines the scope of class III games in which Indians may engage and that a tribal-state compact may address (*see Artichoke Joe's California Grand Casino v.*

Norton, supra at 720-723; *United States v. Santee Sioux Tribe of Nebraska,* 135 F.3d 558, 563-564 [1998], *cert. denied* 525 U.S. 813, 119 S.Ct. 48, 142 L.Ed.2d 37 [1998]; *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Green,* 995 F.2d 179, 181 [1993]; *United States v. Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation, California,* 33 F.Supp.2d 862, 863 [1998]). While that term may be susceptible to more than one interpretation, a review of the legislative history of IGRA convinces us that defendants have the better argument regarding the meaning of the term.

2. *Legislative History of IGRA*

Our review of the background of IGRA necessarily begins with *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244 [1987]. Congress developed IGRA in response to *72*Cabazon* (*see* S. Rep. No. 100-446, 100th Cong., 2d Sess., reprinted in 1988 U.S. Code Cong. & Admin. News, at 3071), a case addressing California's regulation of bingo games conducted by Indian tribes on reservation land. Ruling that the tribes were not required to adhere to state regulation of the games (*see California v. Cabazon Band of Mission Indians, supra* at 211-212, 107 S.Ct. 1083), the U.S. Supreme Court began its analysis by reaffirming the long-settled principle that "Indian tribes retain attributes of sovereignty over both their members and their territory * * * and that tribal sovereignty is dependent on, and subordinate to, only the [f]ederal [g]overnment, not the [s]tates" (*id.* at 207, 107 S.Ct. 1083 [internal quotation marks and citations omitted]; *see New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 332, 103 S.Ct. 2378, 76 L.Ed.2d 611 [1983]). Nevertheless, the Court explained, state law may apply on Indian lands if Congress expressly so provides or, in the absence of express

congressional consent, where state law is not preempted (*see California v. Cabazon Band of Mission Indians, supra* at 207, 215-216, 107 S.Ct. 1083).

The Court concluded that the particular statute at issue, Public Law 280 (Pub. L. 83-280, 67 U.S. Stat. 588 [1953]), did not make California law applicable to bingo played on Indian lands. The Court explained that Public Law 280 drew a distinction between "criminal/prohibitory" laws and "civil/regulatory" state laws, stating:

> "if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not **57 authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the [s]tate's public policy" (*id.* at 209, 107 S.Ct. 1083).

After noting that in addition to bingo, California permits a substantial amount of gambling activity--including a state lottery, pari-mutuel horse betting and various card games--the Court determined that "California regulates rather than prohibits gambling in general and bingo in particular" (*id.* at 211, 107 S.Ct. 1083), despite a prohibition in the California Penal Code on bingo for noncharitable purposes. In addition, after balancing the interests of the federal government and Indian tribes against the state's interest in regulating high-stakes bingo played on *73 Indian lands, the Court concluded that California law was preempted by Public Law 280, explaining that "[s]tate regulation would impermissibly infringe on tribal government" (*id.* at 222, 107 S.Ct. 1083).

While *Cabazon* involved a different statute than that before us,

the case remains instructive. Congress enacted IGRA, in part, to clarify that courts should *not* engage in the balancing test used by the U.S. Supreme Court to determine whether state law is preempted with respect to gaming on Indian lands. In this regard, the Select Committee on Indian Affairs report on IGRA indicates that "in the final analysis, it is the responsibility of the Congress, with its plenary power over Indian affairs, to balance competing policy interests and to adjust, where appropriate, the jurisdictional framework of regulation of gaming on Indian lands" (S. Rep. No. 100-446, 100th Cong., 2d Sess., at 3). Congress also incorporated into IGRA a modified version of the prohibitory/regulatory distinction articulated in *Cabazon*. Under the statute, "courts will consider the distinction between a [s]tate's civil and criminal laws to determine whether a body of law is applicable, as a matter of [f]ederal law, to either allow or prohibit certain activities" (S. Rep. No. 100-446, 100th Cong., 2d Sess., at 6).

The report discusses in depth the requirement that class II gaming be permitted if "located within a [s]tate that permits such gaming for any purpose by any person, organization or entity" (25 USC § 2710[b][1][A])--language which also appears in the portion of the statute relating to class III gaming and defines the scope of class III gaming that a tribal-state compact may address, as noted above. The report makes clear:

> "The phrase 'for any purpose by any person, organization or entity' makes no distinction between [s]tate laws that allow class II gaming for charitable, commercial or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the [s]tate in which tribes are located, then tribes, as governments, are free to engage in such gaming" (S. Rep. No. 100-446, 100th Cong., 2d Sess., at 12).

The report thus demonstrates that with respect to class II gaming, "Congress intended to permit a particular gaming activity, *74 even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity" (*United States v. Sisseton-Wahpeton Sioux Tribe,* 897 F.2d 358, 365 [1990]). Although the report expressly addressed language in 25 USC § 2710(b)(1)(A) relating to class II gaming, the identical phrase--providing that gaming may be located only in "a [s]tate that permits such gaming for any purpose by any person, organization or entity"--appears in section 2710(d)(1)(B) with respect to class III gaming. Inasmuch as the same word or **58 phrase used in different parts of a statute will be presumed to have the same meaning throughout in the absence of an indication of an intent to the contrary (*see* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 236, at 401), we agree with defendants that under IGRA, class III games that are not prohibited are properly the subject of negotiation in tribal-state compacts even if those games are heavily regulated and permitted to be played only by charities (*see Mashantucket Pequot Tribe v. State of Connecticut,* 913 F.2d 1024, 1029-1030 [1990], *cert. denied* 499 U.S. 975, 111 S.Ct. 1620, 113 L.Ed.2d 717 [1991]; *Coeur d'Alene Tribe v. State of Idaho,* 842 F.Supp. 1268, 1274-1275 [1994], *affd.* 51 F.3d 876 [1995], *cert. denied* 516 U.S. 916, 116 S.Ct. 305, 133 L.Ed.2d 209 [1995]; *see also Saratoga County Chamber of Commerce v. Pataki,* 100 N.Y.2d 801, 842, 766 N.Y.S.2d 654, 798 N.E.2d 1047 [2003], *supra* [Read, J., dissenting] ["IGRA mandates that, if a state allows *any* class III gaming by *any* person, a tribe may seek to conduct the same games on its lands."]).

Plaintiffs' interpretation--that the term "such gaming" in the phrase "permits such gaming for any purpose by any person organization, or entity" should be read to mean "gaming for commercial purposes"--renders 25 USC § 2701(d)(1) incoherent. If "such gaming" is read to refer to gaming for a particular purpose, as "commercialized gambling" refers to gambling for the purpose of commercial gain, the phrase "for any purpose" would be rendered meaningless. Because "[i]t is an accepted rule that all parts of a statute are intended to be given effect and that a statutory construction which renders one part meaningless should be avoided" (*Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 515, 577 N.Y.S.2d 219, 583 N.E.2d 932 [1991]), plaintiffs' interpretation must be rejected. We agree with defendants that the phrase "such gaming" refers to the antecedent term "class III gaming"--a type of gaming defined by the rules of the particular games contained therein, rather than by the purpose for which the games are played, such as for profit or for charity. Again, this interpretation is consistent with the legislative history *75 of IGRA, which indicates that the relevant inquiry is whether a particular game is criminally prohibited, not whether the game is played for commercial, charitable or governmental purposes (*see* S. Rep. No. 100- 446, 100th Cong., 2d Sess., at 12).

Defendants err, however, in asserting that simply because any class III gaming is allowed by a state, *all* class III gaming is properly the subject of a tribal-state compact. While the Select Committee on Indian Affairs report explains that tribes are prohibited from operating bingo--a class II game--in the five states which criminally prohibit the game, the report analyzed other class II games, such as card games, separately, stating that such games "are permitted by far fewer [s]tates" (S. Rep. No. 100-446, 100th Cong., 2d Sess., at 11-12). We find the report's

differing treatment of specific games within a gaming class significant inasmuch as it is indicative of a congressional intent that courts look to state law to determine whether *particular* gaming activities are permitted (*see Cheyenne Riv. Sioux Tribe v. State of South Dakota,* 3 F.3d 273, 278-279 [1993]; *Mashantucket Pequot Tribe v. State of Connecticut, supra* at 1029; *Coeur d'Alene Tribe v. State of Idaho, supra* at 1276-1280; *Lac du Flambeau Band of Lake Superior Chippewa Indians v. State of Wisconsin,* 770 F.Supp. 480, 487-488 [1991], *appeal dismissed* 957 F.2d 515 [1992], *cert. denied* 506 U.S. 829, 113 S.Ct. 91, 121 L.Ed.2d 53 [1992]; *see also* ***59Saratoga County Chamber of Commerce v. Pataki, supra* at 843 n. 10, 766 N.Y.S.2d 654, 798 N.E.2d 1047 [Read, J., dissenting]; *cf. Rumsey Indian Rancheria of Wintun Indians v. Wilson,* 64 F.3d 1250, 1258-1259 [1994], *amended* 99 F.3d 321 [1996], *cert. denied* 521 U.S. 1118, 117 S.Ct. 2508, 138 L.Ed.2d 1012 [1997] [concluding that class II legislative history is not applicable to class III gambling, but nevertheless holding that a state need not negotiate with Indian tribes regarding particular gaming activities in which the state forbids others to engage]). [FN3]

FN3. To the extent that defendants rely upon *Mashantucket Pequot Tribe v. State of Connecticut, supra* for the proposition that Indian tribes may engage in *all* types of class III gaming if a state permits *any* type of class III gaming, they misinterpret that case. In *Mashantucket,* the Second Circuit held that Connecticut must negotiate in good faith with tribes that seek to offer the same types of casino games of chance that the state permitted nonprofit organizations to conduct (*id.* at 1029-1032). We note that in its analysis, the Court relied upon a statement by the Eighth Circuit that " 'the

legislative history reveals that Congress intended to permit *a particular gaming activity,* even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that *particular gaming activity* ' " (*id.* at 1029, quoting *United States v. Sisseton-Wahpeton Sioux Tribe,* 897 F.2d 358, 365 [1990], *supra* [emphasis added]). Contrary to defendants' arguments, we conclude that *Mashantucket* should be read as holding that the "permits such gaming" language in 25 USC § 2701(d)(1)(B) refers to the state allowing the *specific* gaming activities at issue (*see Coeur d'Alene Tribe v. State of Idaho,* 842 F.Supp. 1268, 1277 [1994], *supra; Seminole Tribe of Fla. v. Florida,* 1993 WL 475999, U.S. Dist. Ct., S.D.FL., Sept. 22, 1993, Marcus, J.; *cf. Artichoke Joe's California Grand Casino v. Norton,* 353 F.3d 712, 716-717 [2003], *supra* [stating that in *Mashantucket,* the Second Circuit agreed with the argument that where a state permits other types of class III gaming, it cannot refuse to negotiate over any type of class III gaming]; *Yavapai-Prescott Indian Tribe v. State of Arizona,* 796 F.Supp. 1292, 1296 [1992] [same]).

*76 Accordingly, in determining whether New York "permits such gaming" for purposes of satisfying the condition contained in 25 USC § 2710(d)(1)(B), "the question is not whether these games may be characterized as Las Vegas-style or commercialized gambling, but whether a particular game is" permitted under our Constitution, statutes and applicable regulations (*Saratoga County Chamber of Commerce v. Pataki,* 100 N.Y.2d 801, 843 n. 10, 766 N.Y.S.2d 654, 798 N.E.2d 1047 [2003], *supra* [Read, J., dissenting]). "[I]f a state does not

permit 'such gaming,' the matter is at an end" (*Mashantucket Pequot Tribe v. State of Connecticut, supra* at 1028-1029) and a compact purporting to authorize prohibited gambling will not be valid (*see Artichoke Joe's California Grand Casino v. Norton,* 353 F.3d 712, 720-723 [2003], *supra; United States v. Santee Sioux Tribe of Nebraska,* 135 F.3d 558, 563-564 [1998], *supra; Citizen Band Potawatomi Indian Tribe of Oklahoma v. Green,* 995 F.2d 179, 181 [1993], supra; United States v. Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation, California, 33 F.Supp.2d 862, 863 [1998], *supra*). Contrary to defendants' argument that the "permits such gaming" requirement is satisfied if the state allows *any* class III gaming, we conclude that if a particular class III game is not permitted by New York law under any circumstances, a tribal-state compact will not be upheld insofar as it purports to authorize a tribe to conduct that game on Indian lands.

To summarize, while IGRA "preempt[s] the field in the governance of gaming activities on Indian lands" (S. Rep. No. 100-446, 100th Cong., 2d Sess., at 6; *see Gaming Corp. of Am. v. Dorsey & Whitney,* 88 F.3d 536, 546 [1996]), it also gives states, through the tribal-state compacting process, a power withheld from them by the **60 U.S. Constitution--i.e., "some measure of authority over gaming on Indian lands" *77(Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 58, 116 S.Ct. 1114, 134 L.Ed.2d 252 [1996], *supra*). Nevertheless, this authority does not amount to a blanket imposition on tribes of all state laws regarding gambling activity. Instead, consistent with traditional principles of tribal sovereignty, the compacting process constitutes "a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have [s]tate laws and [s]tate jurisdiction extend to tribal lands, the

Congress will not unilaterally impose or allow [s]tate jurisdiction on Indian lands for the regulation of Indian gaming activities" (S. Rep. No. 100-446, 100th Cong., 2d Sess., at 5-6). We emphasize, however, that Indian tribes may not engage in class III gaming activities if those particular activities are not "located in a [s]tate that permits such gaming for any purpose by any person, organization, or entity" (25 USC § 2710[d][1][B]). That is, gaming activities that are not permitted by a state cannot be the subject of a tribal-state compact or played on Indian lands. We must therefore determine what gaming activities are permitted under the N.Y. Constitution and laws regulating gambling.

B. *Gaming in New York*

New York has generally prohibited gambling throughout its history, with certain exceptions. The state's first Constitution, in 1777, did not mention gambling or lotteries and numerous statutes authorized public lotteries to raise money for a variety of purposes by the colony and state from 1746 through 1821 (*see* 3 Lincoln, The Constitutional History of New York, at 34-43 [1906]; *see also People ex rel. Ellison v. Lavin,* 93 App.Div. 292, 300, 87 N.Y.S. 776 [1904], *revd. on other grounds* 179 N.Y. 164, 71 N.E. 753 [1904]; *Matter of Dwyer,* 14 Misc. 204, 205-206, 35 N.Y.S. 884 [1894]). The second Constitution, approved in 1821, however, expressly prohibited lotteries not already authorized by law stating: "No lottery shall hereafter be authorized in this state; and the [l]egislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law" (1821 N.Y. Const., art. VII, § 11). An amendment prohibiting horse racing was also proposed but rejected by the Constitutional Convention of 1821 (*see* 3 Lincoln, The Constitutional History of New York, at 45

[1906]).

The third Constitution contained a similar provision that prohibited lotteries but remained silent on other forms of gambling, providing: "nor shall any lottery hereafter be authorized, *78 or any sale of lottery tickets allowed within this state" (1846 N.Y. Const., art. I, § 10). In 1887, the Legislature enacted the Ives pool law, authorizing gambling on horse racing during certain times of the year with a five percent tax on revenues to be used for the support of horse breeding (L. 1887, ch. 479). This form of gambling was subsequently forbidden by the fourth Constitution, approved in 1894 (*see* 3 Lincoln, The Constitutional History of New York, at 47 [1906]). Article I, § 9 provided: "nor shall any lottery or the sale of lottery tickets, pool-selling, book making, or any other kind of gambling hereafter be authorized or allowed within this [s]tate" (1894 N.Y. Const., art. I, § 9). An identical provision appeared in the current Constitution, when it was approved in 1938.

Since that time, N.Y. Constitution, article I, § 9 has been amended five times. [FN4] **61 The effect of these amendments has been to broaden the scope of permissible gambling in the state through a series of exceptions to the general prohibition on gambling. In 1939, the section was amended to except pari-mutuel betting on horse races from the prohibition on gambling. A 1957 amendment authorized localities to permit religious, charitable and nonprofit organizations to conduct bingo or lotto. A 1966 amendment permitted the state to conduct a lottery, with the net proceeds to be used to support education. Most relevant here, section 9(2) was amended in 1975 to allow localities to permit, in addition to bingo and lotto, "games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or

symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance." Subsequently, in 1984, the Constitution was amended again to provide that the previously mandatory $250 limit on single prizes and $1,000 limit on a series of prizes in games permitted by the 1957 and 1975 amendments could be varied by law.

> FN4. In addition to these five amendments, article I, § 9 was amended in 2001 to render it gender neutral, as was the rest of the Constitution.

As amended, the current version of N.Y. Constitution, article I, § 9(1) thus reads in pertinent part:

"except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in *79 connection therewith as may be authorized and prescribed by the [L]egislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the [L]egislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the [L]egislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state."

N.Y. Constitution, article I, § 9(2) provides:

"any city, town or village within the state may by an approving vote of the majority of the qualified electors * * * authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers

or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance."

Subdivision two imposes a number of restrictions on permissible gaming, in addition to any others that the Legislature may prescribe. Specifically, subdivision two provides that "only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall be permitted to conduct such games; * * * the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; * * * no person except a bona fide member of any such organization shall participate in the management or operation of such game; * * * no person shall receive any remuneration for participating in the management or operation of any such game[; and u]nless otherwise provided by law, no single prize shall **62 exceed [$250], nor shall any series of prizes on one occasion aggregate more than [$1,000]" (N.Y. Const., art. I, § 9 [2]). Subdivision two further directs the Legislature to "pass appropriate laws to effectuate the purposes of this subdivision [and to] ensure that such games are rigidly regulated to prevent commercialized gambling" (N.Y. Const., art. I, § 9[2]). Notably, *80 subdivision two expressly permits the Legislature to pass laws restricting the gambling permitted by that section (N.Y. Const., art. I, § 9[2]).

The foregoing illustrates that while the N.Y. Constitution generally bans gambling and evinces a strong policy against

commercialized gambling, at least some form of gambling has been authorized throughout most of the state's history. Indeed, the N.Y. Constitution contained a complete prohibition on gambling only from 1894 to 1939 and now permits several forms of gambling, some of which would be deemed class III gaming under IGRA (*see* 25 USC § 2703[7], [8]). The legalization of certain forms of gambling "indicate[s] that the New York public does not consider authorized gambling a violation of 'some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal' " (*Intercontinental Hotels Corp. of Puerto Rico v. Golden,* 15 N.Y.2d 9, 15, 254 N.Y.S.2d 527, 203 N.E.2d 210 [1964], quoting *Loucks v. Standard Oil Co.,* 224 N.Y. 99, 111, 120 N.E. 198 [1918]), as plaintiffs would have us hold. Instead, "[t]he trend in New York State demonstrates an acceptance of *licensed* gambling transactions as a morally acceptable activity, not objectionable under the prevailing standards of lawful and approved social conduct" (*Intercontinental Hotels Corp. of Puerto Rico v. Golden, supra* at 15, 254 N.Y.S.2d 527, 203 N.E.2d 210 [emphasis in original]; *see generally Ramesar v. State of New York,* 224 A.D.2d 757, 759, 636 N.Y.S.2d 950 [1996], *lv. denied* 88 N.Y.2d 811, 649 N.Y.S.2d 378, 672 N.E.2d 604 [1996] [noting that public policy generally continues to disfavor gambling and, thus, regulations pertaining thereto must be strictly construed]).

Regarding "games of chance," the 1975 amendment permits, on its face, "games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance." Plaintiffs do not dispute that this provision allows Las Vegas or casino nights, subject to the limits imposed in N.Y. Constitution, article I, § 9(2), and that charities currently engage in millions of dollars worth of casino

gambling per year (*see Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 844, 766 N.Y.S.2d 654, 798 N.E.2d 1047 [2003], *supra* [Read, J., dissenting]). Nor do plaintiffs assert that the state prohibits charities and nonprofit organizations, during their Las Vegas or casino nights, from engaging in any of the 31 games listed in the compact that the Governor executed with the Seneca Nation pursuant to part B of chapter 383 of the Laws of 2001. In this regard, we note that the 1975 Senate debate leading to this constitutional amendment indicates that the purpose of the amendment was to expand the types of games in which religious, *81 charitable or nonprofit organizations could legally engage to include Las Vegas night casino-type gambling, such as roulette, blackjack and dice games (*see* New York State Senate Debate, June 19, 1975, at 8234-8235, 8239-8242, 8259, 8266-8268, 8271-8272)--games authorized in the Seneca Nation compact, as well.

For example, Senator B.C. Smith, in answering Senator Lewis's objection to the amendments allowing "Las Vegas night" and "roulette wheel[s]" in houses of worship (*id.* at 8234-8235), stated that "your synagogues, your churches and your fire **63 departments in certain sections of the state are doing just this, just the very thing that is legalized by this proposition" (*id.* at 8239). He explained that many fire departments and churches could not survive without "their bazaars and fairs" (*id.* at 8241) and that, while people operating such fairs were arrested in certain counties (*id.* at 8239-8240), "when [he] was District Attorney of [his] county, * * * [he] wouldn't arrest anybody that was running a firemen's affair * * * [with] big six" (*id.* at 8241-8242). Indeed, Senator Lewis, who strongly opposed the amendment on the ground that it could potentially "make every one of the institutions, religious and eleemosynary, a pseudo or partial casino," conceded that roulette wheels "exist[ ] in my

community and they have [them] in the fairs all around me, and the police, if they are involved, look the other way" (*id.* at 8245). Further, Senator Rollison, in explaining the bill, indicated that dice games, such as craps, would be permitted under the amendment (*id.* at 8259). These excerpts from the debates demonstrate that the 1975 amendment was intended to except from the general prohibition on gambling the precise types of casino gaming contemplated by part B of chapter 383 of the Laws of 2001, provided that such gaming was conducted for charitable purposes.

This conclusion is further supported by reference to the text and history of General Municipal Law article 9-A, which the Legislature enacted pursuant to the 1975 amendment and which codifies the definition of permissible games of chance. At the time it was enacted, General Municipal Law former § 186(3) provided:

> " 'Games of chance' shall mean and include only the games known as 'merchandise wheels,' 'coin boards,' 'merchandise boards,' 'seal cards,' 'raffles,' and 'bell jars' and such other specific games as may be authorized by the [Racing and Wagering Board], in which prizes are awarded on the basis of a designated winning number or numbers, color or colors, symbol or symbols determined by chance, but not including games commonly known as 'bingo or lotto' which are controlled under *82 article [14-h] of this chapter and also not including 'slot machines,' 'bookmaking,' 'policy or numbers games' and 'lottery' as defined in [Penal Law § 225.00]. No game of chance shall involve wagering of money by one player against another player."

The legislative debates and history regarding the enactment of General Municipal Law article 9-A similarly evince an acknowledgment that the definition contained in section 186

was intended to include casino-type games (*see e.g.* New York State Senate Debate, June 26, 1976, at 9649-9651 [stating that dice games, blackjack and baccarat are among the games permitted under the statute]; Mem. of State Racing and Wagering Board, at 2, Bill Jacket, L. 1976, ch. 960 [indicating that "roulette, dealer blackjack and baccarat" would be permissible]). [FN5] These games, such as blackjack, craps, roulette and baccarat, generally would be considered class III gaming under IGRA (*see* **6425 USC § 2703[8]). Pursuant to General Municipal Law § 186(3), the Racing and Wagering Board lists a number of casino-type games, such as craps, roulette, blackjack and big six, that may be conducted in this state (*see* 9 NYCRR 5620.1). Again, these games fall into the category of class III gaming under IGRA (*see* 25 USC § 2703[8]).

> FN5. It is worth noting that the Legislature was not unfamiliar with the term "game of chance" or "contest of chance" at the time that the 1975 amendment was approved and the General Municipal Law was enacted (*see* Penal Law § 225.00; Donnino, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 39, Penal Law art. 225, at 196-197). In fact, the term has an extensive legal history (*see People ex rel. Ellison v. Lavin,* 179 N.Y. 164, 168-171, 71 N.E. 753 [1904]) and has been interpreted to include such games as "stud" poker (*see People v. Dubinsky,* 31 N.Y.S.2d 234, 237 [Ct. of Special Sessions 1941])--a class III game under IGRA (*see* 25 USC § 2703[8]).

In sum, despite a ban on commercialized gambling, a general prohibition on all gambling except that expressly authorized and a history that includes a 45-year period during which

gambling was banned completely, New York now constitutionally permits a substantial amount of gambling. The 1975 amendment to the Constitution and implementing legislation and regulations (*see* General Municipal Law § 186[3]; 9 NYCRR 5620.1), in particular, were intended to permit charities, religious organizations and other nonprofit groups to conduct the types of gaming categorized as class III by IGRA.

Inasmuch as the state permits, subject to heavy regulation and various restrictions, others to engage in the type of gaming activities at issue here, it merely regulates, as opposed to *83 completely bars, those gaming activities. [FN6] For purposes of IGRA, then, the state "permits such gaming for any purpose by any person, organization or entity" (25 USC § 2710[d][1][B]). Accordingly, the class III gaming at issue is properly the subject of a tribal-state compact and part B of chapter 383 of the Laws of 2001 authorizing the Governor to enter into such compacts is consistent with both IGRA and N.Y. Constitution, article I, § 9. [FN7]

> FN6. Because plaintiffs do not challenge the constitutionality of any of the specific games contemplated by the Seneca Nation compact and none of the parties provides any analysis of how each game is played in their briefs before us, we do not address whether any particular game listed, as opposed to class III gaming in general, is a "game of chance" within the meaning of N.Y. Constitution, article I, § 9 or General Municipal Law article 9-A. Although we recognize that the determination of whether a state "permits such gaming" should be made on a game-by-game basis (*see Saratoga County Chamber of Commerce v. Pataki*, 100

N.Y.2d 801, 843 n. 10, 766 N.Y.S.2d 654, 798 N.E.2d 1047 [2003], *supra* [Read, J., dissenting]), in the absence of any challenge or analysis by the parties, we assume that the particular class III games in the compact are constitutional for the purposes of this decision only and confine our ruling to the issue advanced before us--whether the ban in N.Y. Constitution, article I, § 9 on "commercialized gambling" amounts to a prohibition of *all* class III gaming for purposes of IGRA.

FN7. Plaintiffs make much of our statement in *Saratoga County Chamber of Commerce v. Pataki,* 293 A.D.2d 20, 740 N.Y.S.2d 733 [2002], *affd.* 100 N.Y.2d 801, 766 N.Y.S.2d 654, 798 N.E.2d 1047 [2003], *cert. denied* 540 U.S. 1017, 124 S.Ct. 570, 157 L.Ed.2d 430 [2003] that "the commercialized Las Vegas style gambling authorized by the compact is the antithesis of the highly restricted and 'rigidly regulated' forms of gambling permitted by the N.Y. Constitution * * * and New York's established public policy disfavoring gambling" (*id.* at 24, 740 N.Y.S.2d 733, quoting N.Y. Const., art. I, § 9[2]). In *Saratoga,* we addressed only the issue of whether the Governor had the authority to execute tribal-state compacts in the absence of legislative approval (*id.* at 21, 740 N.Y.S.2d 733). Thus, the statement on which defendants rely was dictum and their reliance is misplaced. In any event, we also noted in that case that the state's "restrictive statutes and constitutional provisions * * *, although generally banning gambling and at all times evidencing a strong policy against commercialized gambling, may have unwittingly opened the door to Indian casino gaming through the subsequently enacted IGRA" (*id.* at

25, 740 N.Y.S.2d 733).

We similarly conclude that part B is consistent with the requirement in N.Y. Constitution, article I, § 9 that the Legislature "pass appropriate laws to * * * ensure that such games are rigidly **65 regulated to prevent commercialized gambling." Plaintiffs' argument that part B violates this requirement is premised on their incorrect belief that New York laws relating to gaming activities apply with the same force and effect on Indian lands as they do elsewhere within the state. As explained above, because Indian tribes retain attributes of sovereignty, state law applies on Indian lands only if Congress so provides or state law is not preempted (*see* **84 *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 207, 215-216, 107 S.Ct. 1083, 94 L.Ed.2d 244 [1987], *supra*). In the context of casino gaming on Indian lands, IGRA both determines the extent to which state law applies to gaming on Indian lands (*see Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 58, 116 S.Ct. 1114, 134 L.Ed.2d 252 [1996], *supra; see also Artichoke Joe's California Grand Casino v. Norton,* 353 F.3d 712, 716 [2003], *supra; Keweenaw Bay Indian Community v. United States,* 136 F.3d 469, 472 [1998], *cert. denied* 525 U.S. 929, 119 S.Ct. 335, 142 L.Ed.2d 277 [1998]) and "preempt[s] the field in the governance of gaming activities on Indian lands" (S. Rep. No. 100-446, 100th Cong., 2d Sess., at 6).

States do not have the authority to regulate class III gaming on Indian lands other than through the compacting procedure outlined in IGRA. States are not *required* by IGRA to agree to compacts (*see* 25 USC § 2710[d][7][B][vi], [vii]), although they may choose to enter, via the compacting process, an otherwise preempted field if their actions are in compliance

with the federal standards embodied in IGRA. Should a state refuse to participate in the negotiation process, the result would be only that the state would lose its ability to influence the terms on which gaming will occur, with such authority reverting to the Secretary of the Interior (*see* 25 USC § 2710[d][7][B][vii]; 25 CFR part 291). Thus, IGRA cannot be interpreted as a federal directive that requires states to assume a regulatory role in violation of the anti-commandeering principle contained in the 10th Amendment of the U.S. Constitution (*see Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422, 1432-1435 [1994], *revd. on other grounds* 517 U.S. 1129, 116 S.Ct. 1410, 134 L.Ed.2d 537 [1996]; *Yavapai-Prescott Indian Tribe v. State of Arizona*, 796 F.Supp. 1292, 1297 [1992]; *see generally Printz v. United States*, 521 U.S. 898, 926, 117 S.Ct. 2365, 138 L.Ed.2d 914 [1997]). Instead, the IGRA compacting process is best understood as providing states with the opportunity to establish "some measure of authority over gaming on Indian lands [,] a power withheld from them by the Constitution" (*Seminole Tribe of Fla. v. Florida, supra* at 58, 116 S.Ct. 1114).

Stated differently, IGRA does not force New York to accept a particular compact. It simply affords the state the opportunity to assert authority over gaming on Indian lands, a power that the state otherwise lacks. Because part B of chapter 383 of the Laws of 2001 permits the Governor to enter into tribal-state compacts *extending* state regulatory authority to commercialized casino gambling on Indian lands--where such authority would not otherwise exist--we cannot say that the Legislature *85 has violated the constitutional mandate to pass laws limiting commercialized gambling. [FN8] Rather, part B permits the Governor **66 to assume a role in setting the terms and restrictions pursuant to which Indian gaming will occur,

and thereby limit such gaming in a manner consistent with the state's interests.

> FN8. Plaintiffs observe that 25 USC § § 232 and 233 grant New York criminal and civil jurisdiction over Indian lands and suggest that this authority extends to gaming activities on Indian lands. To the extent that 25 USC § § 232 and 233 conflict with IGRA--i.e., insofar as those statutes provide that the state retains authority over gaming other than that agreed to in a tribal-state compact--we conclude that IGRA impliedly repealed those statutes (*see generally State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703-705 [1994], *cert. denied* 513 U.S. 919, 115 S.Ct. 298, 130 L.Ed.2d 211 [1994], abrogated by statute as stated in *Narragansett Indian Tribe v. National Indian Gaming Commn.*, 158 F.3d 1335, 1337-1338 [1998]).

Plaintiffs' remaining arguments regarding part B of chapter 383 require little discussion. Plaintiffs contend that the Governor cannot, consistent with New York public policy as set forth in the N.Y. Constitution, concur with the Secretary of the Interior that gaming on Indian lands other than an existing reservation would not be detrimental to surrounding communities. Plaintiffs' argument is unpersuasive. Before gaming may occur on lands held in trust by the federal government for the benefit of Indian tribes, the Governor's concurrence is required (*see* 25 USC § 2719[b][1][A]). We note that the statute leaves the decision to the Governor whether, in his judgment, gaming on Indian lands would be detrimental--i.e., have adverse social and economic consequences--on the surrounding communities (*see* 25 USC § 2719[b][1][A]). It does not require a determination that the gaming would fall within one of the constitutional

exceptions to the state's general prohibition on gambling or that the gaming would be lawful if conducted on state land. Second, while New York does have a strong policy against *commercialized* gambling, "the New York public does not consider authorized gambling a violation of 'some prevalent conception of good morals, [or] some deep-rooted tradition of the common weal' " (*Intercontinental Hotels Corp. of Puerto Rico v. Golden,* 15 N.Y.2d 9, 15, 254 N.Y.S.2d 527, 203 N.E.2d 210 [1964], *supra* [citation omitted]). Hence, the Governor's concurrence cannot be said to violate New York public policy.

Finally, we reject plaintiffs' argument that part B of chapter 383 represents an unlawful delegation of power to the Governor because it provides no legislative guidance with respect to future compacts in Ulster and Sullivan Counties. Part B adequately *86 sets forth the parameters for compacts between New York and Indian tribes. It indicates the number of casinos permitted, the general location of those casinos, and a number of provisions that must be included in the compacts regarding, among other things, access of labor unions for purposes of soliciting employee support for representation, binding arbitration of labor disputes, assurances that the tribes have adequate civil recovery systems to protect the rights of visitors and guests, and assurances that the tribes will maintain sufficient liability insurance to compensate visitors and guests for injuries that might occur. We conclude that in part B, " 'the basic policy decisions underlying the [executive action] have been made and articulated by the Legislature' " (*Bourquin v. Cuomo,* 85 N.Y.2d 781, 785, 628 N.Y.S.2d 618, 652 N.E.2d 171 [1995] [citation omitted]). That part B leaves discretion to the Governor in negotiating compacts with Indian tribes merely permits compliance with the state's obligation to engage in

good-faith negotiations (*see* 25 USC § 2710[d][3][A]) and does not render the provision an unlawful delegation of authority.

II. VLTs

Part C of chapter 383 of the Laws of 2001 authorizes the Division to license and operate VLTs at eight licensed pari-mutuel **67 racetracks. Pursuant to the statute, five racetracks--Aqueduct, Monticello, Yonkers, Finger Lakes and Vernon Downs--are automatically eligible to apply for a license to install VLTs (*see* L. 2001, ch. 383, part C, § 1; Tax Law § 1617-a [a]). Upon approval from the governing body of the appropriate counties, certain harness racetracks--Saratoga Equine Sportscenter, Batavia and Buffalo--may also install VLTs (*see* L. 2001, ch. 383, part C, § 1; Tax Law § 1617-a [a]; Racing, Pari-Mutuel Wagering & Breeding Law art. 3). [FN9] Three other racetracks-- Belmont Park, Saratoga Thoroughbred Racetrack and the New York State Exposition in Onondaga County--are not eligible to install VLTs (*see* L. 2001, ch. 383, part C, § 1; Tax Law § 1617-a [a]). The statute directs that the payout for prizes is to be 90% of sales (*see* L. 2001, ch. 383, part C, § 2; Tax Law § 1612[c][3]). As originally enacted, part C provided that the balance of the total revenue was to be paid to education after deducting 15% for the Division's operating and administrative costs and a "vendor's fee" of between 12% and 25% to be paid to the racetrack (*see* L. 2001, ch. 383, part C, § 2). The statute required that each racetrack reinvest a percentage *87 of its vendor fee to support higher purses and the appropriate breeding fund at the racetrack (*see* L. 2001, ch. 383, part C, § 2). [FN10]

FN9. The parties indicate that each of the jurisdictions

authorized to approve the operation of VLTs at local racetracks has now done so.

FN10. As amended, the Tax Law caps the operational and administrative costs for the Division at 10% and sets the vendor fee at a flat rate of 29% (*see* Tax Law § 1612[b]). The statute has also been amended to alter the reinvestment percentages for purses and breeding funds. Reinvestment was initially set at 35% in the first year and 45% in subsequent years for purses, and at no less than 5% for breeding funds (*see* L. 2001, ch. 383, part C, § 2). Reinvestment percentages for purses are now set at 25.9% for the first three years, 26.7% in the fourth and fifth years and 34.5% in subsequent years; for breeding funds, the rate is set at 4.3% in the first five years and 5.2% for subsequent years (*see* Tax Law § 1612[c][1]).

The operation of VLTs is described in Requests for Proposals (hereinafter RFPs) issued by the Division inviting potential vendors to submit proposals for the implementation and operation of a VLT system. The system is to be comprised of three components: (1) video display terminals that accept players' paper currency, credit or account cards, game identifier and price selections, and permit players to view the results of their purchased electronic instant lottery tickets; (2) site controllers that link a number of video display terminals to a central system, store and manage unpurchased electronic ticket series and are programmed to dispense electronic lottery tickets in the sequence received from and determined by the central system; and (3) a central system that randomly shuffles and stores electronic ticket series, distributes the tickets to site controllers, monitors all system activity, and performs

accounting and security functions. The RFPs contemplate participation by multiple VLT players who will compete against each other by purchasing electronic instant lottery tickets from a finite depleting pool of tickets in a given series. Indeed, video display terminals *must* be linked electronically to allow players to compete against other players for a chance to purchase winning electronic lottery tickets. An electronic ticket series consists of a finite set of tickets from a particular instant game pool and, upon creation, is intermixed to ensure randomness. The ticket series is stored in the central system until divided into smaller quantities and sent to site controllers.

To play video lottery, a player inserts paper currency or another Division-approved **68 representative of value into a video display terminal to purchase one or more electronic instant lottery tickets. The player determines the particular game and amount to be wagered. The next situated electronic ticket is then dispensed from the site controller to the display terminal, *88 which shows the outcome associated with that ticket. The player cannot affect the outcome associated with the ticket beyond selecting the type of game to be played; the tickets are predetermined to be either winners or losers before the time of purchase. Once a player has purchased a ticket, it is removed from the pool of available electronic tickets in a given series and cannot be selected or dispensed again. Upon completion of play, the player receives a redemption ticket that can be used for wagering at another display terminal or presented for verification and payment at a validation terminal.

VLTs thus may be understood as presenting electronic versions of the instant-ticket lottery games conducted by the Division. As with "scratch-off" tickets, an electronic instant lottery ticket is a winning or nonwinning ticket at the time of its creation and

no skill on the part of the player is involved in the game. The distribution of electronic tickets, like scratch-off tickets, is random. In both paper and electronic instant lottery games, players compete against each other in the sense that once an instant ticket is removed from a series, the finite pool of tickets in that series shrinks for all players. The only other game permitted on VLTs is electronic keno, in which players compete against each other by choosing a series of numbers, colors or symbols from a finite pool in the hope that their selections will match those later randomly drawn by the central system.

Plaintiffs challenge part C of chapter 383 on two primary grounds. First, they argue that VLTs are slot machines and, thus, do not fit within the exception of state-run lotteries from the general ban on gambling in N.Y. Constitution, article I, § 9. Second, plaintiffs assert that the directive in part C that racetracks reinvest a percentage of their vendor fees in purses and breeding funds violates the constitutional mandate that the net proceeds of state-operated lotteries "be applied exclusively to or in aid or support of education in this state as the [L]egislature may prescribe" (N.Y. Const., art. I, § 9[1]). We address each of these arguments in turn.

A. *VLTs and Slot Machines*

Plaintiffs contend that VLTs are, in reality, slot machines. They assert that slot machines cannot be "lotteries" within the meaning of that term in N.Y. Constitution, article I, § 9(1) and, thus, part C of chapter 383 of the Laws of 2001 is unconstitutional. Plaintiffs compare the description of the video display *89 terminals used in video lottery gaming that is found in the Division's RFPs to the definition of "[s]lot machine" contained in Penal Law § 225.00(8), which states in relevant part: " 'Slot machine' means a gambling device which,

as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such manner that, depending upon elements of chance, it may eject something of value."

Plaintiffs aver that the 1966 amendment to N.Y. Constitution, article I, § 9 authorizing the state to conduct lotteries permits only traditional sweepstakes lotteries with periodic drawings. Specifically, they assert that the N.Y. Constitution permits only those types of lotteries in which licensed vendors sell tickets for later drawings to occur with extremely limited frequency and at which winning numbers would be selected at some central headquarters. If the lottery ticket purchased by **69 the consumer contained the winning number, that consumer would collect a pool of winnings that depended on the total number of tickets purchased. Plaintiffs contend that machines or gaming systems, such as VLTs, that permit games to be played with infinite frequency are slot machines and therefore cannot be considered to offer "lottery" games. Alternatively, plaintiffs contend that under the definition in General Municipal Law § 186(3), as amended by part B, § 5 of chapter 383 of the Laws of 2001, video lottery cannot be a "lottery." We disagree.

In determining whether games offered on the VLTs implemented by the Division pursuant to part C constitute "lotteries," we are mindful of the rule that a legislative enactment may be found unconstitutional only upon a "demonstrat[ion of] the statute's invalidity 'beyond a reasonable doubt' " (*LaValle v. Hayden*, 98 N.Y.2d 155, 161, 746 N.Y.S.2d 125, 773 N.E.2d 490 [2002], quoting *People v. Tichenor*, 89 N.Y.2d 769, 773, 658 N.Y.S.2d 233, 680 N.E.2d 606 [1997], *cert. denied* 522 U.S. 918, 118 S.Ct. 307, 139 L.Ed.2d 237 [1997]). Defendants note that the N.Y. Constitution does not

define the term "lotteries." They urge us to adopt a broad definition of that term, used by the courts primarily in interpreting the penal statutes, that a game is a lottery if it involves the three elements of consideration, chance and prize (*see e.g. People v. Hines*, 284 N.Y. 93, 101-103, 29 N.E.2d 483 [1940]; People v. Miller, 271 N.Y. 44, 47, 2 N.E.2d 38 [1936]; *see also Trump v. Periee*, 228 A.D.2d 367, 368, 644 N.Y.S.2d 270 [1996] [defining lottery as containing those three elements in a taxpayers' action seeking to enjoin the defendants from operating the game known as "Quick Draw"]; *Harris v. Economic Opportunity Commn. of Nassau County*, 171 A.D.2d 223, 227, 575 N.Y.S.2d 672 [1991] [holding *90 that, in an action by the winner of a raffle to recover a prize, a raffle had elements of consideration, chance and prize and was therefore an illegal lottery]). Inasmuch as play on VLTs indisputably involves those three elements, defendants argue that part C of chapter 383 is constitutional.

We agree with defendants that VLTs are simply a new method of presenting lottery games to the public and, therefore, the operation of VLTs by the state falls within the constitutional exception to the general ban on gambling. We conclude, however, that the 1966 amendment creating the exception that authorized a state-run lottery--pursuant to which part C was enacted--must be strictly construed to ensure that the exception does not swallow the rule (*see generally Molina v. Games Mgt. Servs.*, 58 N.Y.2d 523, 529, 462 N.Y.S.2d 615, 449 N.E.2d 395 [1983]; *Matter of New York Racing Assn. v. Hoblock*, 270 A.D.2d 31, 33-34, 704 N.Y.S.2d 52 [2000]; *People v. Kim*, 154 Misc.2d 346, 351, 585 N.Y.S.2d 310 [1992]; *see also* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 213, at 372).

The elements of consideration, chance and prize are present in all forms of gambling or games of chance (*see generally* Penal Law § 225.00[2] [defining "gambling"]). Pursuant to the definition advanced by defendants, *any* game of chance--including such casino games as poker, blackjack, craps and roulette-- could be a lottery if operated by the state. Such a broad interpretation would expand the constitutional exception permitting state-run lotteries to such an extent that it would swallow the general constitutional prohibition on gambling (*see* 1984 Ops. Atty. Gen. No. 94, at 19-24; 1981 Ops. Atty. Gen. No. 68, at 12). N.Y. Constitution, article I, § 9 cannot support such a broad reading. Nevertheless, we conclude that even pursuant to a stricter reading of **70 the term "lotteries," video lottery gaming passes muster.

The term "lotteries" must be interpreted with reference to the language of the constitutional exception itself and the legislative history of the amendment, as well as related statutory and constitutional provisions. In its general prohibition, N.Y. Constitution, article I, § 9 refers to a lottery as one of several forms of gambling, stating that "except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling * * * shall hereafter be authorized or allowed within this state" (N.Y. Const., art. I, § 9[1]). "Lottery," as used in article I, § 9, can thus be understood to mean a distinct, narrower form of the broad term "gambling," which is defined by the three elements of consideration, chance and prize (*see* Penal Law § 225.00[2] [defining "gambling" as *91 "stak(ing) or risk(ing) something of value upon the outcome of a contest of chance [FN11] or a future contingent event not under (one's) control or influence, upon an agreement or understanding that he (or she) will receive something of value in the event of a certain outcome"];

see also Johnson v. Collins Entertainment Co., 333 S.C. 96, 101, 508 S.E.2d 575, 577-578 [1998] [concluding that where a state constitution distinguishes between lottery and gambling or other games of chance, lottery must be defined in a narrow sense]; *Poppen v. Walker*, 520 N.W.2d 238, 244-245 [1994] [same]; Eisenrauch, Video Poker and the Lottery Clause: Where Common Law and Common Sense Collide, 49 S.C. L. Rev. 549, 567-572 [1998] [same]).

> FN11. "Contest of chance" is defined as "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein" (Penal Law § 225.00[1]).

The lottery exception itself authorizes "lotteries operated by the state and the sale of lottery tickets in connection therewith" (N.Y. Const., art. I, § 9[1]). On its face, the constitutional exception contemplates that state-run lotteries involve the sale of tickets, i.e., lots or chances (*see* N.Y. Const., art. I, § 9[1]; *see also* 1981 Ops. Atty. Gen. No. 68, at 13). The Senate debates on the lottery amendment [FN12] also indicate that the Legislature conceived of the sale of tickets and multiple participation as integral elements of lotteries (*see* New York State Senate Debate, June 14, 1965, at 4808 ["[L]ottery is * * * a prize, a consideration and multiple participation."]; *see also* New York State Senate Debate, June 14, 1965, at 4764-4765, 4796-4800; New York State Senate Debate, Feb. 7, 1966, at 290, 298, 309, 311, 360-361). Indeed, one of the sponsors of the amendment, Senator Brownstein, predicted that millions of tickets would be sold (New York State Senate Debate, June 14, 1965, at 4769).

FN12. The debate of the Assembly on the amendment evidently was not transcribed (*see* 1981 Ops. Atty. Gen. No. 68, at 20-21).

Moreover, while the debates reflect an intent to leave the amendment deliberately vague with respect to the mechanics of the lottery (*see* New York State Senate Debate, Feb. 7, 1966, at 319 ["[W]hen we passed the pari-mutuel betting amendment in 1939, * * * it did not include the mechanics of how it was to be worked. What we are only involved with here is the question of whether or not we should allow the general practice of lottery."]; *see also* New York State Senate Debate, *92 Feb. 7, 1966, at 331-332, 341-342, 351, 363; New York State Senate Debate, **71 June 14, 1965, at 4796, 4807-4809), the amendment does expressly refer to the sale of tickets. This explicit reference to tickets emphasizes that, despite an intent to leave to the Legislature's discretion the details of the operation of the lottery, the use of randomly-drawn tickets to determine a winner or winners is a necessary component of any state-run lottery authorized pursuant to the N.Y. Constitution. Similarly, the implementing legislation, enacted contemporaneously in 1967, refers to the sale of tickets and multiple players (*see* L. 1967, ch. 278, § 1 [creating Tax Law former § 1305(a), (b)]). Hence, we conclude that in addition to the elements of consideration, chance [FN13] and prize traditionally employed by this state's case law in defining the term "lottery" for law enforcement purposes (*see e.g. People v. Hines,* 284 N.Y. 93, 101-103, 29 N.E.2d 483 [1940], *supra; People v. Miller,* 271 N.Y. 44, 47, 2 N.E.2d 38 [1936], *supra*), N.Y. Constitution, article I, § 9(1) sanctions only those state-run lotteries that involve tickets and multiple participation.

FN13. The parties do not dispute that the games offered

> on VLTs involve pure chance, in the sense that electronic tickets are randomly drawn with no element of skill involved. Therefore, it is not necessary for us to decide whether a lottery may incorporate any element of skill (*see generally People ex rel. Ellison v. Lavin,* 179 N.Y. 164, 170-171, 71 N.E. 753 [1904]; Donnino, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 39, Penal Law art. 225, at 196).

Support for our conclusion that a lottery is defined by the elements of consideration, chance, prize, tickets and multiple participation may also be found in the Penal Law. The requirement that a lottery involve multiple participation can be found in the definition of lottery contained in the 1965 Penal Law revision, enacted by the same Legislature that drafted and initially approved the lottery amendment. Although the scope of the constitutional amendment authorizing lotteries is not determined by the Penal Law, we note that the Legislature had before it the new definition of lottery contained in that statute when crafting the lottery exception and, thus, that definition informs our reading of the amendment. The relevant statutory language has not been altered since the 1965 revision. Specifically, Penal Law § 225.00(10) defines "lottery" as:

> "an unlawful gambling scheme in which (a) the players pay or agree to pay something of value for chances, represented and differentiated by numbers or by combinations of numbers or by some other *93 media, one or more of which chances are to be designated the winning ones; and (b) the winning chances are to be determined by a drawing or by some other method based upon the element of chance; and (c) the holders of the winning chances are to receive something of value."

In referring to "players" participating in a "drawing" or some

other random event, the statute contemplates multiple participation, as opposed to a single player competing against a single machine. The statute also refers to consideration in the form of "something of value" paid by players, determination of winners by a method based on chance, and a prize to be paid to the holders of the winning "chances," or lots (*see* Penal Law § 225.00[10]; *see also* 1981 Ops. Atty. Gen. No. 68, at 16-19).

Pursuant to the definition of lottery contemplated by N.Y. Constitution, article I, § 9, the video lottery gaming offered on VLTs authorized by part C of chapter 383 of the Laws of 2001, as described in the Division's RFPs, is permissible. As explained above, to play video lottery on VLTs, players give consideration--paper currency or another lottery-approved representative**72 of value inserted into a display terminal--and, after selecting the game identifier and price per ticket, receive an electronic ticket from a series in which winning tickets are selected in advance and randomly distributed among all tickets to be sold. To play electronic keno, players select numbers, colors or symbols in the hope of matching those randomly drawn by the central system from a larger finite pool of numbers, colors or symbols. The player's success is a matter of pure chance, dependent only on the random distribution of predetermined winning tickets by the central system to site controllers or randomly drawn keno numbers, colors or symbols. If the player wins, he or she receives a prize which may be redeemed by printing an electronically encoded instrument that can be presented for payment at a validation terminal or used for play at another display terminal. The element of multiple participation is present because players compete against each other by purchasing tickets from a finite depleting pool of electronic instant lottery tickets, with a set number of predetermined winning tickets, or in choosing a

series of keno numbers, colors or symbols from a finite pool in the hope that they, as opposed to other players, will have matched those colors, numbers or symbols later drawn.

Further, play on VLTs involves tickets, albeit electronic tickets, which are transferred from the central system to site *94 controllers and then to display terminals upon purchase, but which are not printed or reduced to paper. These electronic tickets are the functional equivalent of paper tickets--they are "evidence of one's entitlement to a prize over claims by competing ticket holders" (*Johnson v. Collins Entertainment Co.*, 333 S.C. 96, 104 n. 10, 508 S.E.2d 575, 579 n. 10 [1998], *supra*). Similarly, the player's recorded keno choices to be played in a later drawing are also the functional equivalent of a paper ticket. Indeed, keno is no different from current lottery games, such as "Quick Draw," which have been upheld as constitutional under N.Y. Constitution, article I, § 9(1) (*see Trump v. Perlee*, 228 A.D.2d 367, 368, 644 N.Y.S.2d 270 [1996], *supra*). To play Quick Draw, individuals select a subset of numbers, in the hope of matching numbers drawn by the Division.

In our view, the fact that the tickets used in VLT play are electronic, as opposed to paper, does not defeat a finding that VLTs are permissible within the meaning of N.Y. Constitution, article I, § 9. In short, play on VLTs involves the elements of consideration, chance, prize, multiple participation and tickets and, thus, the operation of VLTs by the state falls within the constitutional exception to the general ban on gambling.

We reject plaintiffs' argument that VLTs are slot machines within the meaning of the Penal Law and, thus, the games offered on VLTs cannot be "lotteries." As noted above, the

Penal Law defines a slot machine as "a *gambling device* which, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such [a] manner that, depending upon elements of chance, it may eject something of value" (Penal Law § 225.00[8] [emphasis added]). A "gambling device," however, is defined to exclude "lottery tickets * * * and other items used in the playing phases of lottery" (Penal Law § 225.00 [7]). Because VLTs are devices used in the playing phases of a lottery, they cannot be considered slot machines as a matter of law, regardless of their outward resemblance to such machines (*see People v. Kim,* 154 Misc.2d 346, 353-354, 585 N.Y.S.2d 310 [1992], *supra* [concluding that a lotto machine used **73 for play in a lottery did not qualify as a gambling device]; *cf. Matter of Black N. Assoc. v. Kelly,* 281 A.D.2d 974, 975-976, 722 N.Y.S.2d 666 [2001] [vending machine that dispensed calling cards and sweepstakes game pieces and instantly displayed the results in a slot machine-like video display, in the absence of a finding that the game was a lottery, was a slot machine]).

Plaintiffs' reliance on General Municipal Law § 186(3) for the proposition that VLTs are impermissible slot machines is *95 misplaced. While General Municipal Law § 186(3), as originally enacted, defined "games of chance" to exclude both "slot machines" and lotteries, the statute was amended pursuant to part B of chapter 383 to remove the exclusion of slot machines from the definition of "games of chance" (*see* L. 2001, ch. 383, part B, § 5). Inasmuch as slot machines now fall within the statutory definition of " games of chance" while lotteries do not, plaintiffs reason that the two games are mutually exclusive. Plaintiffs then argue that because VLTs resemble impermissible slot machines, they cannot be

"lotteries." This mutual exclusivity, however, does not advance plaintiffs' argument that VLTs are impermissible slot machines. Again, a slot machine is a type of "gambling device" (Penal Law § 225.00 [8]) and gambling devices are defined to exclude "items used in the playing phases of lottery" (Penal Law § 225.00 [7]). Although display terminals outwardly resemble slot machines, VLT play involves the elements of a lottery--consideration, chance, prize, multiple participation and tickets--and, therefore, VLTs do not fulfill the legal definition of slot machine (*see* Penal Law § 225.00[7], [8]).

Moreover, there is no merit to plaintiffs' argument that because video lottery gaming is not the precise type of lottery contemplated by the 1966 Legislature in drafting the constitutional amendment, it is impermissible. Although, as plaintiffs assert, the Senate debates on the amendment include references to sweepstakes lotteries with infrequent drawings (*see e.g.* New York State Senate Debate, June 14, 1965, at 4755, 4777, 4807; New York State Senate Debate, Feb. 7, 1966, at 315), the 1966 amendment authorizing lotteries neither refers to any particular kind of lottery nor places limits on the number of drawings or methods of operating a lottery. Indeed, although certain senators opposed the amendment on the ground that the constitutional language was "indefinite," had no limit on the number of drawings to be held in a given year and did not specify the type of lottery authorized (*see* New York State Senate Debate, June 14, 1965, at 4796-4797, 4814; New York State Senate Debate, Feb. 7, 1966, at 315, 335-336, 341), the amendment, as passed, left these issues to the Legislature's discretion.

We conclude that the N.Y. Constitution contains no bar to the modernization of the lottery or the introduction of new

technological methods of delivering lottery tickets to the public. Nor is the state limited to the precise types of lotteries familiar to the public in 1966. Indeed, we note again that "Quick Draw," *96 a nontraditional form of lottery, has been upheld as constitutional (*see Trump v. Perlee,* 228 A.D.2d 367, 368, 644 N.Y.S.2d 270 [1996], *supra*). Similarly here, the fact that video lottery was not contemplated at the time of the amendment does not render it unconstitutional.

Plaintiffs' reliance on 1981 and 1984 New York Attorney General opinions in arguing that the video lottery games offered on VLTs are not lotteries is similarly unwarranted. Those opinions were given in regard to games that are distinguishable. The 1981 opinion addressed proposed video games, such as computer poker and blackjack, that did not involve **74 multiple participation or electronic tickets (*see* 1981 Ops. Atty. Gen. No. 68). Instead, the games there involved a single player pitting his or her skill against a machine (*see id.* at 13-20). The 1984 opinion involved a proposal by the Division to permit betting on the outcome of professional sports events (*see* 1984 Ops. Atty. Gen. No. 94). The Attorney General concluded that such betting is more in the nature of pool-selling and book making than a lottery and, thus, did not fall within the exception of state-run lotteries from the general ban on gambling (*see id.* at 3-4). While those opinions do indicate that the 1966 Senate Debates on the lottery amendment refer to traditional sweepstakes lotteries (*see* 1984 Ops. Atty. Gen. No. 94, at 19-24; 1981 Ops. Atty. Gen. No. 68, at 21), nothing in the opinions suggests that the constitutional authorization was limited to those types of lotteries. Further, although the opinions conclude that the lottery exception must be interpreted narrowly and that lotteries must include the elements of consideration, chance, prize, tickets and multiple participation,

there is no indication that electronic games meeting those criteria would be impermissible (*see* 1984 Ops. Atty. Gen. No. 94, at 19-24; 1981 Ops. Atty. Gen. No. 68, at 3-20). [FN14]

> FN14. Similarly, the cases from other states relied upon by plaintiffs involve gaming that is distinguishable from VLTs, such as video poker and other games that did not involve multiple-participant drawings or tickets (*see Johnson v. Collins Entertainment Co.*, 333 S.C. 96, 104, 508 S.E.2d 575, 579 [1998], *supra; Crochet v. Priest*, 326 Ark. 338, 345- 347, 931 S.W.2d 128, 132-133 [1996]; *Poppen v. Walker*, 520 N.W.2d 238, 247-248 [1994], *supra*) or do not address the merits of the issue (*see State of West Virginia ex rel. Mountaineer Park v. Polan*, 190 W.Va. 276, 283-285, 438 S.E.2d 308, 315-317 [1993]; *cf. People ex rel. City of Charleston v. West Virginia Econ. Dev. Auth.*, 214 W.Va. 277, ----, 588 S.E.2d 655, 665-670 [2003]).

Finally, we reject plaintiffs' assertion that part C of chapter 383 violates plaintiff Lee Karr's rights to equal protection *97 because it does not give his local legislative body the opportunity to disapprove the siting of VLTs at the Monticello racetrack, despite requiring the approval of the relevant local legislatures to permit VLTs to be operated at the Saratoga Equine Sportscenter, Batavia and Buffalo harness racetracks. Plaintiffs assert that part C infringes upon Karr's right to vote. Even assuming that part C, in drawing a geographic distinction among different racetracks, somehow implicates an individual citizen's right to vote, "a [s]tate is not prohibited from recognizing the distinctive interests of the residents of its political subdivisions" even in reference to voter classification (*City of New York v. State of New York*, 76 N.Y.2d 479, 486,

561 N.Y.S.2d 154, 562 N.E.2d 118 [1990]; *see Town of Lockport v. Citizens for Community Action at the Local Level*, 430 U.S. 259, 269-273, 97 S.Ct. 1047, 51 L.Ed.2d 313 [1977]). Here, the difference in classification could have been justified by a legislative conclusion that while the racetracks that needed no further approval had poor attendance records and would benefit the most from the installation of VLTs, the need for assistance at other tracks was not as critical even though those tracks could benefit from the additional business that VLTs would bring (*see generally Matter of Roosevelt Raceway v. County of Nassau*, 18 N.Y.2d 30, 40-41, 271 N.Y.S.2d 662, 218 N.E.2d 539 [1966], *appeal dismissed* 385 U.S. 453, 87 S.Ct. 614, 17 L.Ed.2d 510 [1967]). This justification forecloses plaintiffs' equal protection challenge.

B. *Application of Lottery Revenues to Education*

Plaintiffs argue that part C of chapter 383 of the Laws of 2001, in requiring **75 vendors to dedicate a portion of their fees to breeding funds and for the purpose of enhancing purses at the racetracks where VLTs are located (*see* L. 2001, ch. 383, part C, § 2; Tax Law § 1612[c][1]), violates the constitutional mandate that "the net proceeds" of state-run lotteries "be applied exclusively to or in aid or support of education in this state" (N.Y. Const., art. I, § 9[1]). Plaintiffs concede that a vendor fee is a legitimate cost of operating a lottery and may be deducted from net lottery proceeds consistent with N.Y. Constitution, article I, § 9. Nevertheless, they challenge the vendor fee here on the ground that it is not based solely on the cost of housing VLTs because a portion of that fee is set aside for reinvestment in enhanced purses and breeding funds. [FN15]

FN15. Breeding funds are public benefit corporations

> that are statutorily required to distribute assets to a variety of entities, including 4-H societies, New York State exposition breeding farms, and county and town agricultural societies (*see* Racing, Pari-Mutuel Wagering and Breeding Law § 332). The vendor fee originally was set by the Division at 25% of the total sales remaining after payout of prizes (*see* L. 2001, ch. 383, part C, § 2 [permitting the Division to establish a vendor's fee of 12%-25% of the revenue remaining after payout for prizes]). The statute has been amended to set the vendor fee at 29% (*see* Tax Law § 1612[b]).

Defendants contend that the reinvestment requirement cannot be considered a deduction from the "net proceeds" within *98 the meaning of N.Y. Constitution, article I, § 9 because the reinvestment comes from the vendor fee and the ultimate disposition of that fee is not subject to the constitutional limitation that net proceeds be applied to support education. We disagree and hold instead that the Legislature lacks the discretion to direct that lottery revenues may be used for noneducational purposes.

As defendants observe, the N.Y. Constitution does not define "net proceeds," but the term is generally defined by the courts as gross proceeds less any expenses or costs that may be properly deducted (*see Matter of Boerner*, 58 Misc.2d 144, 147, 294 N.Y.S.2d 725 [1968]; *Matter of Estate of von Seidlitz*, 6 Misc.2d 583, 584, 161 N.Y.S.2d 195 [1957]; *see also* Black's Law Dictionary 1222 [7th ed. 1999] [defining "net proceeds" as "[t]he amount received in a transaction minus the costs of the transaction (such as expenses and commissions)"]). While we agree with the parties that vendor fees generally constitute a necessary administrative cost of housing and installing VLTs,

those fees may not be artificially inflated to include expenses that are not necessary administrative costs. We are unpersuaded that reinvestment in breeding funds and enhanced purses is a necessary expense of the vendors housing VLTs, unlike such costs as space, staffing and security needs. In our view, by providing that 40%-50% of the vendor fee is to be reinvested in breeding funds and enhanced purses, the Legislature has signaled that the vendors themselves do not require that portion of the fee as compensation. Simply put, reinvestment in breeding funds and enhanced purses is not a reasonable, necessary expense or cost of maintaining VLTs and, thus, funds dedicated for that purpose cannot be deducted from the net proceeds of the lottery without violating the requirement in N.Y. Constitution, article I, § 9(1) that lottery revenues be used to support education.

Fundamentally, defendants err in asserting that this allocation of revenue is a permissive legislative judgment. To be sure, the N.Y. Constitution provides that "the net proceeds of [state-run lotteries] shall be applied exclusively to or in aid or support of education in this state *as the **76 [L]egislature may prescribe* " (N.Y. Const., art. I, § 9[1] [emphasis added]). The phrase "as the *99 [L]egislature may prescribe" does give the Legislature discretion in the allocation of the "net proceeds" of lottery revenues. This discretion, however, is subject to the limitation that net proceeds must go "exclusively to or in aid or support of education" (N.Y. Const., art. I, § 9[1]). [FN16] Here, defendants make no argument that the reinvestment in breeding funds and enhanced purses somehow aids or supports education, except to the extent that such reinvestment *may* draw more people to racetracks who *might,* in turn, use VLTs and generate more lottery revenues. Such a tenuous, incidental connection between the reinvestment requirement and

education simply does not satisfy the constitutional requirement that net proceeds be devoted to educational purposes.

> FN16. In this regard, Tax Law § 1612(b) provides that lottery revenues are to be paid into the state treasury to the credit of the state lottery fund created by State Finance Law § 92-c, which then earmarks the funds for educational purposes.

Indeed, the Senate and Assembly debates on part C of chapter 383 indicate that the purpose of the reinvestment requirement was not to benefit education, but to contribute to the enhancement of horse racing, specifically, and agriculture, generally (*see* New York State Senate Debate, Oct. 24, 2001, at 11599; New York State Assembly Debate, Oct. 25, 2001, at 22-23). Contrary to defendants' argument, the racing industry is not merely an indirect beneficiary of part C of chapter 383; instead, the racing industry is a direct recipient of lottery revenues via the reinvestment requirement. In our view, a holding that the Legislature has the discretion to divert a portion of lottery revenues to noneducational purposes, regardless of the laudable nature of those purposes, would defeat the requirement that the amendment authorizing state-run lotteries be construed narrowly, as an exception to the general ban on gambling (*see generally Molina v. Games Mgt. Servs.*, 58 N.Y.2d 523, 529, 462 N.Y.S.2d 615, 449 N.E.2d 395 [1983], *supra; Matter of New York Racing Assn. v. Hoblock*, 270 A.D.2d 31, 33-34, 704 N.Y.S.2d 52 [2000], *supra; People v. Kim*, 154 Misc.2d 346, 351, 585 N.Y.S.2d 310 [1992], *supra*), as well as the spirit of the amendment, which requires that lottery revenues be earmarked for the support of education (*see* New York State Senate Debate, June 14, 1965, at 4764, 4787-4788; New York State Senate Debate, Feb. 7, 1966, at 251,

290, 300- 301).

The cases relied upon by defendants in arguing that the reinvestment of revenues in breeding funds and enhanced *100 purses does not violate N.Y. Constitution, article I, § 9 are distinguishable (*see Finger Lakes Racing Assn. v. New York State Off-Track Pari-Mutuel Betting Commn.*, 30 N.Y.2d 207, 217, 331 N.Y.S.2d 625, 282 N.E.2d 592 [1972], *supra; Saratoga Harness Racing Assn. v. Agriculture & N.Y. State Horse Breeding Dev. Fund*, 22 N.Y.2d 119, 122-123, 291 N.Y.S.2d 335, 238 N.E.2d 730 [1968]). Those cases were decided pursuant to the 1939 constitutional amendment permitting pari-mutuel betting on horse racing. Specifically, that amendment authorizes "pari-mutuel betting on horse races as may be prescribed by the [L]egislature and from which the state shall derive *a reasonable revenue for the support of government* " (N.Y. Const., art. I, § 9[1] [emphasis added]). The cases interpret the language "reasonable revenue for the support of government" (N.Y. Const., art. I, § 9[1]; *see* **77 *Finger Lakes Racing Assn. v. New York State Off-Track Pari-Mutuel Betting Commn., supra* at 217, 331 N.Y.S.2d 625, 282 N.E.2d 592 [concluding that distribution of a portion of horse racing revenues to municipalities constituted reasonable revenue for political subdivisions of state government]; *Saratoga Harness Racing Assn. v. Agriculture & N.Y. State Horse Breeding Dev. Fund, supra* at 122-123, 291 N.Y.S.2d 335, 238 N.E.2d 730 [concluding that the statute does not require that all revenue in excess of expenses be devoted to the direct support of the government]). They do not involve the constitutional requirement that "net proceeds" from state-run lotteries "be applied exclusively to or in aid or support of *education* " (N.Y. Const., art. I, § 9[1] [emphasis added]).

We note that if the amendment had been intended to require that only such portion of lottery revenues as the Legislature deemed reasonable be dedicated to education, it could have included the same "reasonable revenue" language used in the 1939 amendment permitting pari-mutuel betting on horse racing. The lottery amendment, however, refers to net proceeds, not reasonable revenue. Moreover, although the breeding funds are "the instrument through which the Legislature has chosen to effectuate [the] legitimate public interest and purpose" of applying a certain portion of the revenues from racing to the "general improvement of the sport and the facilities used" (*Saratoga Harness Racing Assn. v. Agriculture & N.Y. State Horse Breeding Dev. Fund, supra* at 123, 291 N.Y.S.2d 335, 238 N.E.2d 730), the distribution of lottery revenues to these breeding funds or to enhanced purses cannot be said to aid or support education, as required by the amendment authorizing state-run lotteries. Hence, to the extent that the statute artificially inflates vendor fees and then requires that a portion of those fees be applied to noneducational *101 purposes, part C of chapter 383 of the Laws of 2001 violates N.Y. Constitution, article I, § 9(1). [FN17]

FN17. Our analysis is not dependent on the particular percentages of the vendor fee to be reinvested. Instead, we conclude that the Legislature lacks the authority to direct *any* reinvestment in purses or breeding funds under N.Y. Constitution, article I, § 9. Thus, the Legislature's amendments to Tax Law § 1612 modifying the percentages of the vendor fee to be reinvested and the amount of the vendor fee itself (*see* Tax Law § 1612[c][1]; L. 2003, ch. 63, part W, § § 2, 3; L. 2003, ch. 62, part Z3, § 1) do not render the issue moot or materially alter our analysis (*cf. Flanders*

Assoc. v. Town of Southampton, 198 A.D.2d 328, 328, 603 N.Y.S.2d 176 [1993]; *Matter of Schulz v. State of New York*, 182 A.D.2d 3, 4-5, 587 N.Y.S.2d 444 [1992], *appeal dismissed* 80 N.Y.2d 924, 589 N.Y.S.2d 310, 602 N.E.2d 1126 [1992], *lv. denied* 80 N.Y.2d 761, 592 N.Y.S.2d 670, 607 N.E.2d 817 [1992]; *Lake v. Regan*, 135 A.D.2d 312, 316, 525 N.Y.S.2d 425 [1988], *appeal dismissed* 72 N.Y.2d 840, 530 N.Y.S.2d 555, 526 N.E.2d 46 [1988], *lv. denied* 72 N.Y.2d 807, 533 N.Y.S.2d 56, 529 N.E.2d 424 [1988]).

Defendants assert that even if racetracks may not be directed to transfer a portion of their vendor fees to purses and breeding funds under N.Y. Constitution, article I, § 9, the invalid portion of part C should be severed. As defendants observe, part C provides that "[i]f any clause, sentence, provision, paragraph, subdivision, section, or part of this act" is found invalid, the remainder of the act "shall not be affected" (L. 2001, ch. 383, part C, § 3). Defendants urge us, in the event of a holding that part C violates N.Y. Constitution, article I, § 9, to sever only the invalid reinvestment portion of the legislation.

In determining whether an invalid portion may be severed and the remainder of the statute preserved, the test is " 'whether the [L]egislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. **78 The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots' " (*Matter of Westinghouse Elec. Corp. v. Tully*, 63 N.Y.2d 191, 196, 481 N.Y.S.2d 55, 470 N.E.2d 853 [1984], quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60, 129

N.E. 202 [1920], *cert. denied* 256 U.S. 702, 41 S.Ct. 624, 65 L.Ed. 1179 [1921]). Here, the inclusion of the severability clause indicates that the Legislature would have wished the statute enforced with the invalid portion severed (*see* L. 2001, ch. 383, part C, § 3; *Matter of New York State Superfund Coalition v. New York State Dept. of Envtl. Conservation*, 75 N.Y.2d 88, 94, 550 N.Y.S.2d 879, 550 N.E.2d 155 [1989]). Were we to excise only the reinvestment portion of part C, however, the vendors would simply retain the inflated fee. That is, if the portion of part C, § 2 imposing the reinvestment requirement were struck from the statute, the revenues dedicated to enhanced purses and breeding funds would not be paid into the state treasury *102 to the credit of the state lottery fund created by State Finance Law § 92-c and earmarked for education, along with the balance of revenue generated by VLTs. Instead, under the remaining language of part C, the vendors would retain a fee that the Legislature, in directing that a portion should be reinvested elsewhere, has determined those vendors do not require to assure the availability of VLTs for public convenience (*see generally* Tax Law § 1604[a][9]). Such a result cannot stand.

In short, merely severing the reinvestment portion of the legislation does not cure the constitutional defect because the statute was drafted in such a way that severance would result in distributing to vendors the funds that are constitutionally required to be earmarked for education. Nor can we substitute our judgment for that of the Legislature by establishing a fee percentage that we would deem reasonable. We conclude that the first two paragraphs of part C, § 2 of chapter 383 of the Laws of 2001, amending Tax Law former § 1612 by adding paragraphs (a)(5)(A) and (B) and setting forth the distribution of VLT revenue and directing vendors to reinvest a portion of

their fee are inextricably intertwined. As a practical matter, the language of the statute regarding reinvestment cannot be removed so as to permit the statute to operate in a constitutional manner. Further, severing the entire revenue distribution scheme as set forth in Tax Law former § 1612(a)(5)(A) and (B), while leaving the remainder of the statute intact, would essentially leave the statute inoperable--the result of severance would be either an inflated vendor fee or no fee at all. Under these circumstances, severance is inappropriate. " 'It would be pragmatically impossible, as well as jurisprudentially unsound, for us to attempt to identify and excise particular provisions while leaving the remainder * * * intact since the product of such an effort would be a regulatory scheme that * * * the Legislature * * * [never] intended' " (*Matter of New York State Superfund Coalition v. New York State Dept. of Envtl. Conservation, supra* at 94, 550 N.Y.S.2d 879, 550 N.E.2d 155, quoting *Boreali v. Axelrod,* 71 N.Y.2d 1, 14, 523 N.Y.S.2d 464, 517 N.E.2d 1350 [1987]). We therefore must modify Supreme Court's order to declare the entirety of part C of chapter 383 unconstitutional.

III. *Multistate Lottery*

Part D of chapter 383 of the Laws of 2001 directs the Division to operate and administer within the state a multi-jurisdiction and out-of-state lottery in cooperation with a government-*103 authorized lottery of one or more jurisdictions (*see* L. 2001, **79 ch. 383, part D, § 1; Tax Law § 1604[a]). Part D further authorizes the Director of the Lottery to enter into agreements for a multistate game, which may include "a combined drawing, a combined prize pool, the transfer of sales and prize monies to other jurisdictions as may be necessary, and such other cooperative arrangements as the director deems necessary or desirable" (L. 2001, ch. 383, part D, § 3; Tax Law § 1617).

Pursuant to the statute, the Division entered into an agreement (hereinafter the Mega Millions agreement), along with the operators of lotteries in nine other states, [FN18] for the joint operation of a multistate lottery game known as Mega Millions or other games that may be offered from time to time. Under the Mega Millions agreement, the parties share operating costs equally, liability for prize payments is determined by the percentage of the state's Mega Millions sales as a proportion of the total sales, and revenues generated within each state that are not allocated to prizes or joint operating expenses remain within the state for distribution in accordance with the state's constitutional, statutory and regulatory requirements.

> FN18. The other states participating at the time were Georgia, Illinois, Maryland, Massachusetts, Michigan, New Jersey, Ohio, Virginia and Washington.

Plaintiffs assert that part D, as implemented by the Mega Millions agreement, violates N.Y. Constitution, article I, § 9 because the multistate game is not "operated" by New York alone, but by several states. Further, plaintiffs challenge part D on the ground that the "net proceeds," within the meaning of article I, § 9, raised by other states participating in the multistate lottery cannot be dedicated exclusively to education within this state. We are not persuaded by plaintiffs' arguments.

As discussed above, N.Y. Constitution, article I, § 9(1) generally prohibits gambling, but exempts state-run lotteries, among other things, from the ban. The N.Y. Constitution permits "lotteries *operated by the state* and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the [L]egislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in

this state as the [L]egislature may prescribe" (N.Y. Const., art. I, § 9[1] [emphasis added]). Under the Mega Millions agreement, while certain joint functions and necessary operating costs are shared, New York controls the operation of the lottery within its borders. New York determines the allocation of net proceeds raised within the state, the manner in which Mega Millions *104 tickets are sold and distributed within the state, the commissions paid for the sale of tickets, and the advertising and marketing of Mega Millions. The agreement expressly provides that "[i]n the event of [a] conflict between this [a]greement and the constitution, statutes, rules or regulations of any [p]arty [l]ottery, the [p]arty [l]ottery's constitution, statutes, rules and regulations shall control." That is, New York law will control in the state should there be a conflict with a provision of the agreement. Further, all claims regarding tickets purchased in New York must be resolved according to New York law and the state is not responsible for the negligent acts or omission of the officers, appointed officials, employees or agents of any other state.

Under these circumstances, it cannot be said that New York has ceded control of the multistate lottery. Although New York has contracted in the Mega Millions agreement to reimburse other states for the performance of administrative functions such as possession and transfer of grand prize funds and the actual drawing of the multistate lottery numbers, nothing **80 in the N.Y. Constitution forbids the Division from contracting with outside parties to perform administrative functions. NY Constitution, article I, § 9(1) requires only that authorized lotteries be "operated by the state," i.e., supervised or controlled by the state, as opposed to a private entity (*see generally* 3 Lincoln, The Constitutional History of New York, at 34-37 [discussing the historical distinction between public and private

lotteries]); it does not mandate that the state alone must perform all aspects of lottery operation (*cf.* 2002 S.C. Ops. Atty. Gen., 2002 WL 735341, 2002 S.C. AG LEXIS 56 [Mar. 25, 2002] [Where the South Carolina Constitution provides that "[*o*]*nly* the [s]tate may conduct lotteries" (*see* S.C. Const., art. XVII, § 7 [emphasis added]), the state may not delegate any functions in operation of lottery to private entities or other states.]). Indeed, the Division routinely contracts for equipment, technology and services needed in the operation of other lottery games and plaintiffs do not dispute that such delegation of administrative functions in other games is proper.

Contrary to plaintiffs' argument, we perceive no significant distinction between the state's contracting with private parties to perform administrative functions and similar contracts with other states (*see State ex rel. Ohio Roundtable v. Taft*, 2003 WL 21470307, *5-*6, 2003 Ohio App. LEXIS 3042, *15-* 18 [2003], *appeal denied* 100 Ohio St.3d 1484, 798 N.E.2d 1093 [2003]). Although plaintiffs assert that New York may not treat its coequal *105 sovereigns in the same manner that it treats private vendors, we note that New York may withdraw from the Mega Millions agreement upon six months' notice or at any time if the multistate game is conducted in a manner that violates New York law. We conclude that even under a narrow interpretation of the constitutional provision, New York retains sufficient supervision over the multistate lottery, through the Mega Millions agreement and regulations issued pursuant to that agreement (*see* 21 NYCRR part 2806), to satisfy the constitutional requirement that a lottery be "operated by the state" (N.Y. Const., art. I, § 9[1]; *see generally Tichenor v. Missouri State Lottery Commn.*, 742 S.W.2d 170, 174 [1988] [Multistate lottery is permissible under a constitutional provision authorizing establishment of a "Missouri state

lottery."]; 1990 Del. Ops. Atty. Gen. No. 90-I019, 1990 WL 482340, 1990 Del. AG LEXIS 3 [Nov. 19, 1990] [Multistate lottery, as conducted by unincorporated association of state agencies through member lotteries' on-line systems is in accordance with Delaware constitutional requirement that lotteries be "under [s]tate control" (Del. Const., art. II, § 17[a]).]; 1987 Kan. Ops. Atty. Gen. No. 87-16, 1987 WL 290413, 1987 Kan. AG LEXIS 178 [Jan. 29, 1987] [Multistate lottery is not precluded by Kansas constitutional provision allowing "state-owned and operated lottery" (Kan. Const., art. XV, § 3c).]). In sum, nothing in the N.Y. Constitution mandates that the lottery be operated exclusively by New York. In fact, the legislative history of the amendment permitting a lottery indicates that the specific details of the operation of the lottery were to be determined by the Legislature (*see e.g.* New York State Senate Debate, Feb. 7, 1966, at 319, 331-332, 363; New York Senate Debate, June 14, 1965, at 4796, 4807-4809).

Similarly, plaintiffs err in asserting that New York has yielded an essential element of its sovereignty by agreeing to delegate administrative functions to other states' agencies. As explained above, New York law controls in the event of a conflict with a provision of the Mega Millions agreement. We note, in addition, that the Mega Millions agreement provides that New York "does not waive the defense of Sovereign **81 Immunity * * * which [states] may have relating to disputed ticket claims and/or player prize claims, nor does [it] pledge the credit (if applicable) of the respective states in relation to such disputed claims." The cases relied upon by plaintiffs in arguing that interstate entities, public authorities and public benefit corporations are not "the *106 state" are inapposite because, here, the Mega Millions agreement creates no such entity (*cf. Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 40-51,

115 S.Ct. 394, 130 L.Ed.2d 245 [1994]; *Collins v. Manhattan & Bronx Surface Tr. Operating Auth.*, 62 N.Y.2d 361, 366, 477 N.Y.S.2d 91, 465 N.E.2d 811 [1984]; *John Grace & Co. v. State Univ. Constr. Fund*, 44 N.Y.2d 84, 88, 404 N.Y.S.2d 316, 375 N.E.2d 377 [1978]; *Braun v. State of New York*, 203 Misc. 563, 564-565, 117 N.Y.S.2d 601 [1952]).

Finally, we reject plaintiffs' contention that the net proceeds from the multistate lottery are not devoted "exclusively to or in aid or support of education in this state" (N.Y. Const., art. I, § 9[1]). Plaintiffs challenge the Mega Millions agreement on the ground that monies transferred pursuant to it by New York for operational expenses and prizes promote the operation of lotteries in other states that generate funds for purposes other than education in this state. The central premise of this argument--that it is improper to deduct from net proceeds costs that are incurred by a "central administrative apparatus" operating the multistate lottery in other states-- mischaracterizes the nature of the Mega Millions agreement. The administrative costs paid by New York do not go to a central administrative apparatus that promotes the lotteries in other states--there is no such central entity operating the multistate lottery. Instead, the funds in question are transferred by New York to other states to reimburse those states for actual operational expenses incurred in providing services to the Division in conjunction with the multistate game.

It bears emphasizing that the funds transferred by New York to other states may be used only for payment of jackpot prizes and reimbursement of preapproved operational expenses. New York funds simply are not used by other states to reduce their administrative costs or to fund their governmental purposes, as plaintiffs allege. Moreover, unlike the revenue distribution

system established under part C of chapter 383 of the Laws of 2001, there is no evidence that the administrative expenses approved in connection with the multistate game are artificially inflated to include expenses that are not necessary for the operation of the game itself. Accordingly, given that the net revenues of the multistate game--the gross proceeds less expenses or costs that may be properly deducted (*see Matter of Estate of Boerner,* 58 Misc.2d 144, 147, 294 N.Y.S.2d 725 [1968], *supra; Matter of Estate of von Seidlitz,* 6 Misc.2d 583, 584, 161 N.Y.S.2d 195 [1957], *supra;* Black's Law Dictionary 1222 [7th ed. 1999])--remain in New York and are dedicated to education in this state, as required by the lottery exception in N.Y. Constitution, article I, § 9, plaintiffs' challenges in this regard to part D of chapter 383 fail.

**107 Conclusion*

We determine that parts B and D of chapter 383 of the Laws of 2001 are constitutional as challenged. While VLTs themselves constitute a valid "lottery" within the meaning of N.Y. Constitution, article I, § 9, the revenue distribution scheme set forth in part C, directing vendors to reinvest a portion of their fee in breeding funds and enhanced horse-racing purses, violates the constitutional requirement that "the net proceeds" of state-operated **82 lotteries "be applied exclusively to or in aid or support of education in this state as the [L]egislature may prescribe" (N.Y. Const., art. I, § 9[1]), rendering part C invalid.

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as declares part C of chapter 383 of the Laws of 2001 constitutional; part C of chapter 383 of the Laws of 2001 declared unconstitutional; and, as so modified, affirmed.

CARDONA, P.J., PETERS, SPAIN and CARPINELLO, JJ., concur.

APPENDIX C

Appendix C – Decision And Order Of The New York State Supreme Court, Albany County, Dated July 17, 2003

STATE OF NEW YORK SUPREME COURT COUNTY OF ALBANY

Joseph DALTON et al., Appellants,

v.

George PATAKI, as Governor of the State of New York, et al., Respondents.

(Action No. 1.)

Lee Karr, Appellant,

v.

George Pataki, as Governor of the State of New York, et al., Respondents.

(Action No. 2.)

TERESI, J:

Plaintiffs' complaints challenge Parts B, C and D of Chapter 383 of the Laws of 2001. Plaintiffs move separately and each defendant or intervenor defendant cross- move for summary judgment. Plaintiffs seek a declaration that Chapter 383 is unconstitutional. Defendants and intervenor defendants seek dismissal of the plaintiffs' complaint.

Initially plaintiffs claim that the Governor's Message of Necessity failed to satisfy the requirements of Article III, §14 of The New York Constitution. Article III §14 of the New York Constitution states:

"§14. [Manner of passing bills; message of necessity for immediate vote]

No bill shall be passed or become a law unless it shall have

been printed and upon the desks of the members, in its final form, at least three calendar legislative days prior to its final passage, unless the governor, or the acting governor, shall have certified, under his hand and the seal of the state, the facts which in his opinion necessitate an immediate vote thereon, in which case it must nevertheless be upon the desks of the members in final form, not necessarily printed, before its final passage; nor shall
any bill be passed or become a law, except by the assent of a majority of the members elected to each branch of the legislature; and upon the last reading of a bill, no amendment thereof shall be allowed, and
the question upon its final passage shall be taken immediately thereafter, and the ayes and nays entered on the journal."

In Finger Lakes Racing Assn. v. New York State off-Track Pari-Mutuel Betting Comm's, 30 NY2d 207, 219 (1972), the Court of Appeals held:

"That time lapse may be cut down, and consideration advanced, if the Governor certifies to the Legislature "the facts which in his opinion necessitate an immediate vote thereon".

The governor's certificate of April 19 described the general purposes of the bill to establish a system of off-track pari-mutuel betting and certified that because the bill had not been on the legislative desks three days "the Leaders of your Honorable bodies have requested this message to permit immediate consideration of the bill prior to your anticipated final adjournment".

Although the proposal had been introduced in the Senate April 18 and adjournment actually occurred on April 22, the

bill could not reasonably have been in final printed form for three days before adjournment and the imminence of adjournment on April 19, when the message was sent, was sufficient to justify the certificate for the reasons stated by the Governor It was passed by the Senate on April 19, the date of the certificate, and by the Assembly the following day.

The time sequence shows the bill could not have been considered by the Legislature unless the certificate had been given and the public interest in its consideration is made conclusive by the fact the Legislature decided not only to consider it but to pass it. The request by the leaders of both houses to the Governor for a certificate shortening the time to permit consideration of the bill before adjournment was to make legislative action possible.

This is a compliance in terms and in spirit with article III (§14). It is the Governor who must express the opinion that an immediate vote is desirable. The facts on which he forms that opinion must satisfy him. The facts supporting his opinion of April 19, are rational and reasonable. If the proposal is to be considered a certificate must be given. This on its face is a sufficient compliance with the Constitution. The Legislature could still say the time for consideration was too short. It did not say that, but accepting the Governor's certificate and considering the proposal in the time available, it passed it. Normally a court should not intervene to nullify an act of the Governor addressed to legislative action which literally and reasonably conform with constitutional requirements (*ef. People ex rel. Hatch v. Reardon, 184 N.Y. 431; People ex rel, Broderick v. Morton, 156 N.Y. 136)".*

Here the subject bill was approved by both the Senate and the

Assembly after their leaders requested and the Governor provided a message certifying to the necessity of an immediate vote on the bill. While the Governor's message of necessity only stated "these bills are necessary to enact certain provisions of law" the Senate and the Assembly accepted his certification and this Court declines to nullify Chapter 383 as his action literally and reasonably conforms with the constitutional requirements of Article III, §14 of the State Constitution.

Next, the Court will address Part B of Chapter 383 which authorizes the Governor to enter into compacts with Indian tribes to allow them to operate Class III commercial gambling casinos. Plaintiffs claim that Part B of Chapter 383 violates the prohibition against commercial gambling set forth in Article 1, §9 of the New York State Constitution. The Court of Appeals has provided two recently written opinions regarding the constitutionality of Class III commercial gambling. See, Saratoga County Chamber of Commerce v. Pataki, __NY2d__ (decided on June 12, 2003) (2003 WL 21357342).

After careful consideration this Court chooses to be guided by Saratoga County Chamber of Commerce v. Pataki, __NY2d__ (decided on June 12, 2003) (2003 WL 21357342) in which, after a lengthy examination of pre and post IGRA (Federal Indian Gaming Regulatory Act) Judge Reed (joined by Judges Wesley and Graffeo) stated:

"In summary, IGRA mandates that, if a state allows any class III gaming by any person, a tribe may seek to conduct the same games on their lands. Moreover, the Second Circuit has firmly rejected the notion (unsuccessfully advanced by the State of Connecticut) that a state that allows only charities to engage in regulated casino-type gambling prohibits class III gaming

activities for purposes of IGRA (id. At 1031-1032). States that allow charities to conduct class III gaming must negotiate in good faith with a Tribe wishing to do the same.

New York has not outlawed all gambling for more than six decades. For better or worse, New Yorkers have adopted a public policy that permits considerable gambling, although regulated."

Judge Reed went on to conclude that:

"When Congress enacted IGRA pursuant to its plenary authority over Indian affairs, it legislated for all 50 states to allow sovereign nations (Indian tribes) to conduct class III gaming activities within States' borders. In this situation, the "critical policy decision" challenged by plaintiffs — to authorize on-reservation class III Indian gaming — derives from the unique interplay between IGRA and our State's Constitution and statutes. The Governor's recognition that class III Indian gaming is mandated in New York by federal law, given policy choices embodied in the New York Constitution and State law, did not constitute policy making. In executing the 1993 Compact, which regulates the Tribe's conduct of class III gaming at its on-reservation casino, the Governor was merely implementing pre-existing federal and State policy choices."

This Court will rely on that decision in finding that Chapter 383, Part B authorizing the Governor to enter into compacts with Indian tribes to operate gaming facilities is consistent with the Federal Courts' holdings in Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024 (2nd Circuit 1990) and California V.

Cabazon Board of Mission Indians, 480 US 202 (1987) and must be upheld.

Next, the Court will address the plaintiffs' challenge to Part C of Chapter 383 which authorizes video lottery terminals (VLT) at certain racetracks. Plaintiffs allege that the VLT's do not fall within the constitutional "lottery" exception and that Part C is unconstitutional as it requires the use of VLT proceeds for non-educational purposes. Defendants assert these are constitutionally permitted video lotteries and that the "net" proceeds from video lottery gaming will be used for educational purposes as required by the constitution.

Initially, the Court notes the well established principles that:

> "Legislative enactments enjoy a strong presumption of constitutionality (*see Paterson v University of State of N.Y.*, 14 NY2d 432, 438 [1964]). While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity "beyond a reasonable doubt" (*People v. Tichenor*, 89 NY2d 769, 773 [1997]; *see also People v. Pagnotta*, 25 NY2d 333, 337 [1969]). Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional (see Alliance of Am. Insurers v. Chu, 77 NY2d 573 [1991]). These well-established principles guide our analysis." [*See, Lavalle v. Hayden*, 98 NY2d 155, 161 (2002)]

Despite plaintiffs' protestations that VLT's do not fall within the lottery exception of Article 1, §9 and their concern with the State's history of limiting the frequency of lottery drawings, the record before this Court demonstrates that the VLT's are indeed

true video lotteries and therefore are a constitutionally permissible lottery game.

The definitions of VLT's in the request for proposal issued by the Division of the Lottery on June 28 defines a VLT as a:

> "video display terminal in which paper currency or credits are deposited or an account card is swiped and a selection is made by the player in order to purchase video lottery tickets in which the results are randomly and immediately drawn from the video lottery central system. A video lottery terminal may not dispense coins directly to winning players. A terminal shall be considered a video lottery terminal notwithstanding the use of an electronic credit system making the deposit of paper currency or coins. Video lottery terminals shall be linked electronically to allow players to compete against other players for a chance to purchase winning video lottery tickets. Prizes shall be awarded on the basis of random selection and not on the basis of skill."

(Emphasis supplied) June 28, 2002 RFP, §1.7

While the outward appearance of a VLT vis-a-vis slot machine is similar, the internal workings, method and limit of draw/payout and link up of competitive players distinguish the VLT. The Court finds this to be within the definition of "lottery" and substantially similar to the instant scratch off tickets available daily 24/7 throughout NewYork.

The Court also notes that in Trump v. Pertee, 228 AD2d 367 (1st Dept., 1996) the First Department in a brief decision stated:

"The motion court properly found that petitioner was not

entitled to a preliminary injunction as he failed to demonstrate a likelihood of success on the merits (*see, Grant Co. v. Srogi*, 52 NY2d 496, 517). The statute and regulations creating the lottery game (L 1995, ch 2, §§94-a-- 94-g; 21 NYCRR part 2835) are presumed constitutional, which presumption was not rebutted by petitioner beyond a reasonable doubt (*see, Matter of Klein [Hartnett], 78 NY2d 662, 666, cert denied 504 US 912).*

As the court found, Quick Draw contains all the essential features of a lottery, since a player tenders money for numerical selection, the winning numbers are randomly drawn, and the player receives a prize if the numbers match (*see*, Penal Law §225.00[10]; *Harris v. Economic Opportunity Commn.*, 171 AD2d 223). The court did not err in its analysis of the enabling legislation or in rejecting petitioner's contention that the game goes beyond the type of lottery contemplated by New York Constitution, article I), §9(1)."

This decision seems to also support the defendants' position regarding lotteries allowed under State Constitution, Article 1, §9. The Court also notes that the Keno games authorized are no different than the already authorized lotteries such as Lotto and Quick Draw and therefore are also constitutionally permissible.

Lastly, the question of whether the use of proceeds from the VLTs for non-educational purposes under the act is unconstitutional must be addressed. Article 1, §9(1) states that the "net proceeds" of all lotteries shall be applied exclusively to or in aid or support of education in this state. The Court also notes that Part C of Chapter 383 requires the "net proceeds" to be used for education purposes as required by the constitution.

This Court agrees with the defendants that the State Constitution leaves to the discretion of the Legislature the determination of what constitutes "net proceeds" and after a full review of this record, this Court does not conclude that it was irrational for the legislature to authorize a vendor fee to be paid and that determination as to what is "net proceeds" will not be disturbed.

Finally, this Court examines the constitutionality of the multi-state lottery authorized by Part D of Chapter 383. Once again the Court notes that:

> "Legislative enactments enjoy a strong presumption of constitutionality (*see Paterson v. University of State of N.Y.*, 14 NY2d 432, 438 [1964]). While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity "beyond a reasonable doubt" (*People v. Tichenor*, 89 NY2d 769, 773 [1997]; *see also People v. Pagnotta*, 25 NY2d 333, 337 [1969]). Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional (*see Alliance of Am. Insurers v. Chu*, 77 NY2d 573, 585 [1991]). These well-established principles guide our analysis." *Lavalle v. Hayden*, 98 NY2d 155, 161 [2002].

Plaintiffs argue that this legislation authorizes a lottery that is not operated by the State as required by Article 1, §9 of the State Constitution and that the "net proceeds" from the operation of this lottery cannot be dedicated exclusively to education within the state.

However, the record establishes that the State of New York

indeed operates the multi-state lottery within this state and retains sufficient control of all aspects under the Mega Millions Agreement to make this agreement consistent with Artide 1, §9 of the State Constitution and the Court again declines to invalidate the act of the legislature, in determining what constitutes "net proceeds".

With regard to Chapter 383, the Court has examined plaintiffs' remaining contentions and finds them to be without merit and will therefore for all of the reasons stated grant defendants' and intervenor defendants' cross-motions for summary judgment and declares Chapter 383 constitutional. Plaintiffs' complaints are dismissed without costs.

All papers, including this Decision and Order are being returned to the attorneys for the State Defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: July 17, 2003
Albany, New York

PAPERS CONSIDERED:

1. Notice of Motion dated December 23, 2002 with Attached Affirmation of Cornelius D. Murray, Esq. also dated December 23, 2002, with Attached Exhibits A-SS.
2. Notice of Motion dated December 20, 2002 with Affirmation of Jay Goldberg, Esq. dated February 7, 2003,

with Attached Exhibits A - C.

3. Notice of Cross-Motion for Summary Judgment dated January 23, 2003 with Affirmation of Robert A. Siegfried, Esq. dated January 21, 2003, with Attached Exhibits A - M; Affidavits of Robert T. Williams dated January 22, 2002, with Attached Exhibits A - G; and Susan E. Beaudoin, Esq. dated January 23, 2003, with Attached Exhibits A - C.
4. Notice of Cross-Motion dated January 22, 2003 with Affirmation of Kevin M. Kearney, Esq. also dated January 22, 2003 with Attached Exhibits A and B; and Reply Affirmation of Christian Riegle dated February 26, 2003.
5. Notice of Cross-Motion dated January 21, 2003 with Affidavits of James R. Wise dated January 20, 2003 and Heidi Schult Gregory, Esq. dated January 21, 2003.
6. Affirmation of Marvin Newberg, Esq. dated January 22, 2003.
7. Notice of Cross-Motion dated January 22, 2003 with Affidavit of Robert J. Galterio dated January 21, 2003, with Att-ached Exhibits A - C.
8. Notice of Cross-Motion dated January 23, 2003 with Affirmation of Randy M. Mastro, Esq. also dated January 23, 2003, with Attached Exhibits A - S.
9. Supplemental Affirmation of Randy M. Mastro in Opposition to Plaintiffs' Motions dated February 28, 2003, with Attached Exhibits.

APPENDIX D

Appendix D – Decisions And Orders of The New York Court of Appeals Dated July 6, 2005

Mo. No. 619

Joseph Dalton, et al.,
Appellants-Respondents,
v.
George Pataki, as Governor of the
State of New York, et al.,
Respondents-Appellants,
et al.,
Respondents.
(Action No. 1)

Lee Karr,
Appellant-Respondent,
v.
George Pataki, as Governor of the
State of New York, et al.,
Respondents-Appellants,
et al.,
Respondents.
(Action No. 2)

Motion for reargument denied.

Mo. No. 578
Joseph Dalton, et al.,
Appellants-Respondents,
v.
George Pataki, as Governor of the
State of New York, et al.,
Respondents-Appellants,
et al.,
Respondents.
(Action No. 1)

Lee Karr,
Appellant-Respondent,
v.
George Pataki, as Governor of the
State of New York, et al.,
Respondents-Appellants,
et al.,
Respondents.
(Action No. 2)

Motion for reargument denied.

APPENDIX E

Appendix E – Concurring In Part And Dissenting In Part Opinion Of Judge George Bundy Smith Of The New York State Court Of Appeals In The Matter Of *Saratoga County Chamber of Commerce v. Pataki,* Dated June 12, 2003

Saratoga County Chamber of Commerce, Inc., et al., Respondents,

v.

George Pataki, as Governor of the State of New York, et al., Appellants.

(Action No. 1.)

Keith L. Wright, as Member of the New York State Assembly, et al., Respondents,

v.

George E. Pataki, as Governor of the State of New York, et al., Appellants.

(Action No. 2.)

Court of Appeals of New York

Argued March 26, 2003;

decided June 12, 2003

Smith, J.(Concurring in part and dissenting in part).
I agree with the majority that the 1993 Compact violates the New York State Constitution in that the Legislature and not the Governor is given policymaking authority. In addition, because article I, § 9 of the New York State Constitution clearly forbids the gambling permitted by the 1993 Compact, I would reach that issue. [FN1]

FN1 I agree with the majority that the plaintiffs have standing under State Finance Law § 123-b. I agree with the Appellate Division that several organizations, having alleged cognizable harm to their members, also have standing. As stated by the Appellate Division in its August 24, 2000 opinion: "New Yorkers for Constitutional Freedoms is a not-for-profit corporation representing approximately 1,650 churches and groups throughout the State whose individual members are opposed to casino gambling and support the constitutional operation of government. The Coalition Against Casino Gambling is a not-for-profit association whose individual members reside primarily in the Catskills and are opposed to casino gambling in that region. Similarly, the Western New York Coalition Against Casino Gambling is an unincorporated association representing religious organizations and grassroots citizens who oppose casino gambling in this State" (275 AD2d 145, 155-156 [2000]).

As noted by the Court's opinion, the New York State Constitution *826 authorizes the Legislature and not the Governor to set policy. It reads: "The legislative power of this state shall be vested in the senate and the assembly" (NY Const, art III, § 1). "The executive power shall be vested in the governor ...." (NY Const, art IV, § 1.) "The governor shall communicate by message to the legislature at every session the condition of the state, and recommend such matters to it as he or she shall judge expedient. The governor shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws are faithfully executed" (NY Const, art IV, § 3).

It is equally true, however, that the Constitution forbids gambling, except for limited exceptions, and prohibits

commercialized gambling. It reads:

*** 670 ** 1063 "[E]xcept as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section" (NY Const, art I, § 9 [1]).

Before the first New York State Constitution was written in 1777, gambling in New York was forbidden. Colonial Governor *827 Tryon was appointed by the King of England in February 1771. [FN2] He served as Governor until after the Revolution began, leaving office on March 23, 1780. The commission and instructions issued to Tryon upon his appointment prohibited gambling, referred to as "lotteries":

"Whereas, a practice hath of late years prevailed in several of our colonies and plantations in America of passing laws for raising money by constituting public lotteries, and whereas, it hath been represented unto us that such practice doth tend to disengage those who become adventurers therein from that spirit of industry and attention to their proper callings and occupations on which the public welfare so greatly depends, and whereas, it further appears that this practice of authorizing lotteries by acts of legislature hath been also extended to the enabling private persons to set up such lotteries, by means

whereof great frauds and abuses have been committed, it is therefore our will and pleasure that you do not give your assent to any act or acts for raising money by the institution of any public or private lotteries whatever until you shall have first transmitted unto us by one of our principal secretaries of state a draught or draughts of such act or acts, and shall have received our direction thereupon."

FN2 Governor William Tryon took his oath of office on July 9, 1771.

The original Constitution of 1777 does not mention gambling or lotteries. Lotteries were again specifically prohibited in the second Constitution, approved in 1821. Article VII, § 11 provided: "No lottery shall hereafter be authorized in this state; and the legislature shall pass laws to prevent the sale of all lottery tickets within this state, except in lotteries already provided for by law."

In the third Constitution, approved in 1846, article I, § 10 prohibited gambling in almost identical language to the previous Constitution: "nor shall any lottery hereafter be authorized, or any sale of lottery tickets allowed within this state."

The fourth Constitution, approved in 1894, specifically prohibited gambling in article I, § 9. In addition to prohibiting lotteries and gambling in general, this section singled out pool-selling and bookmaking as well. It read: "nor shall any lottery or the sale of lottery tickets, pool-selling, book-making, or any *828 other kind of gambling hereafter be authorized or allowed within this State."

In 1938 the fifth and current Constitution was approved. This

Constitution retained the general prohibition against gambling but did authorize a limited range of gambling. Article I, § 9 (1) provides:

***671 ** 1064 "except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, shall hereafter be authorized or allowed within this state."

Article I, § 9 (2) provides:

"any city, town or village within the state may by an approving vote of the majority of the qualified electors ... voting on a proposition ... at a general or special election ..., subject to state legislative supervision and control, ... conduct ... the following categories of games of chance ... (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance."

Subdivision (2) goes on to provide that "only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall

be permitted to conduct such games."

Additionally, subdivision (2) provides that "[t]he legislature shall pass appropriate laws to effectuate the purposes of this subdivision, [and] ensure that such *games are rigidly regulated to prevent commercialized gambling*" (emphasis added).*829 Consistent with this latter provision, the Legislature has outlawed most forms of gambling (*see* Penal Law art 225). As noted in Donnino's Practice Commentary to article 225, "With certain exceptions, gambling is prohibited by the New York State Constitution [article I, § 9]." (McKinney's Cons Laws of NY, Book 39, at 195.)

The Indian Gaming Regulatory Act (25 USC § 2701 *et seq.*) does not require that gambling be imposed upon states where it is forbidden. 25 USC § 2701 (5) provides:

"Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law *and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity*" (emphasis added). [FN3]

FN3 While the dissent cites Connecticut as support for its position that class III gaming should be permitted here, the Connecticut Constitution does not have antigambling provisions similar to those in the New York Constitution.

The Indian Gaming Regulatory Act defines three classes of gaming. Class I gaming means "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations" (25 USC § 2703 [6]). Class II gaming is defined in 25 USC § 2703 (7) (A) which provides:

"The term 'class II gaming' means--
"(i) the game of chance commonly known as bingo ...
"(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
"(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
"(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including ... pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and*830
"(ii) card games that--
"(I) are explicitly authorized by the laws of the State, or
"(II) are not explicitly prohibited by the laws of the State and are played at any location in the State."

The statute further defines what class II gaming does not include. 25 USC § 2703 (7) (B) provides:

"The term 'class II gaming' does not include--
"(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
"(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind."

The term class III gaming is defined in 25 USC § 2703 (8) and provides:

"The term 'class III gaming' means all forms of gaming that are not class I gaming or class II gaming."

In violation of article I, § 9, the 1993 Compact authorizes class III commercial gaming. The preamble to the 1993 Compact, entitled "Tribal-State Compact Between the St. Regis Mohawk Tribe and the State of New York" refers to class III gaming and states "WHEREAS, the St. Regis Mohawk Tribe and the State

of New York have mutually agreed ... to the following provisions governing the conduct of Class III gaming activities on the lands of the Tribe ... [to] (b) develop and implement a means of regulation for the conduct of Class III gaming on Indian lands." Section 3 (a) of the Compact refers to appendix A for a list of games to be conducted under the Compact. Included in this list are baccarat and blackjack, two games which are specifically carved out as being class III gaming (*see* 25 USC § 2703 [7] [B] [i]; [8]). Not only does the 1993 Compact authorize class III gaming, it also involves the State of New York in the investigation and maintenance of the gambling facility. The Tribe is to reimburse the State of New York for its expenses.

The 1999 Amendment to the Compact was equally violative of the New York State Constitution in that it sought to allow computerized versions of class III gaming. The record indicates that despite the expiration of this amendment and the fact that its validity is a moot issue, the gambling authorized by that amendment continues today and is an issue before this Court.*831

Class III gaming is against public policy and has been since before this State's first Constitution. Moreover, Penal Law § 225.05 provides, "A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity." The Penal Law further defines what constitutes advancing gambling activity:

"A person 'advances gambling activity' when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device

or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation" (Penal Law § 225.00 [4]).

California v Cabazon Band of Mission Indians (480 US 202 [1987]) [FN4] does not negate the more than 200-year-old New York antigambling policy. First, the case did not involve a state like New York with a clear antigambling policy. In the course of the *Cabazon* opinion, the Supreme Court stated, "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular" (480 US at 211). Second, no compact between a state and an Indian tribe was involved. The issue was not, as here, whether a compact violated the State Constitution but whether a California statute and county ordinances dealing with bingo and other forms of gambling were criminal or civil for purposes of Public Law 280 (67 US Stat 588, as amended).

FN4 Nothing requires this Court to await a lower court's view of a case before addressing that case.

A review of the facts in *Cabazon* makes clear that it is distinguishable from the case before us. The Cabazon and Morongo Bands of Mission Indians occupy reservations in Riverside County, California. Each band conducts bingo games, open to the general public, on their reservations. The Cabazon *832 Band also operates a card club for playing draw poker and

other card games, which are open to the public.

California, which permits only charitable organizations to play bingo, sought to enforce an anti-bingo statute (Cal Penal Code § 326.5 [West Supp 1987]). Riverside County sought to enforce an anti-bingo ordinance and ordinances prohibiting draw poker and other card games (Ordinance Nos. 331, 558). The actions of the State and County were taken pursuant to Public Law 280.

The Tribes sued the County in Federal District Court seeking a declaratory judgment that the defendants had no authority to apply its laws inside the reservations and an injunction against their enforcement. The State intervened. The District Court granted the Tribes' motion for summary judgment, holding that neither the State nor the County had any authority to enforce its gambling laws within the reservations. The Court of Appeals affirmed, stating that state laws may be applied to tribal Indians on their reservations if Congress has expressly consented. [FN5]

FN5 Under 18 USC § 1162 and 28 USC § 1360, Congress expressly granted six states the right to enforce their laws (both civil and criminal) over Indian tribes: Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin.

Public Law 280 gave California and five other states jurisdiction over specified areas of Indian lands. California was given broad authority to enforce its criminal laws on Indian lands. It was given only limited authority to enforce its civil laws on Indian lands so as not to attempt a total assimilation of Indian tribes, which retain attributes of sovereignty, into American society. The question in this case was whether the antigambling laws were primarily criminal or civil in nature.

***674 **1067 The Supreme Court noted that the Court of Appeals distinguished a state's "criminal/prohibitory" laws and state "civil/regulatory" laws as follows: "if the intent of a state law is generally to prohibit certain conduct, it falls within Pub. L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub. L. 280 does not authorize its enforcement on an Indian reservation" (*California v Cabazon Band of Mission Indians,* 480 US 202, 209 [1987], *citing Barona Group of Capitan Grande Band of Mission Indians v Duffy*, 694 F2d 1185 [9th Cir 1982], *cert denied* 461 US 929 [1983]).

In affirming *Cabazon,* the United States Supreme Court agreed with this distinction while noting this "is not a bright-line *833 rule" and left room for the argument that the bingo statute is prohibitory rather than regulatory (*id.* at 210). Thus, the Supreme Court concluded that the California statutes and ordinances regulating gambling were regulatory and civil, and not criminal and prohibitory, for purposes of Public Law 280.

Finally, I agree with the Appellate Division that the commercialized gambling authorized by the 1993 Compact is a clear violation of the New York Constitution. [FN6] That Court stated:

"Under the circumstances, we conclude that the commercialized Las Vegas style gambling authorized by the compact is the antithesis of the highly restricted and 'rigidly regulated' (NY Const, art I, § 9 [2]) forms of gambling permitted by the NY Constitution ... and New York's established public policy disfavoring gambling." (*Saratoga County Chamber of Commerce v Pataki,* 293 AD2d 20, 24

[2002].)

FN6 The plaintiffs in both cases have addressed article I, § 9, arguing that it prohibits the gambling authorized by the 1993 Compact.

The People of the State of New York have decided in New York's Constitution to prohibit commercial gambling. [FN7] If the elected representatives of the People want to change that policy, they should begin the process of amending the Constitution. [FN8]

FN7 All of those who negotiated the 1993 Compact, as well as those who passed budgetary provisions in its support, were well aware of the antigambling provisions of the New York State Constitution. The specific gambling permitted in article I, § 9 is in no way authority to permit commercial gambling.

FN8 Following oral argument in this case, the Attorney General submitted to this Court a memorandum of understanding between the State of New York and the St. Regis Mohawk Tribe. Among the provisions of the memorandum are (1) a casino to be built in Sullivan County for class III gaming, (2) the prohibition of any slot machines by entities other than Indian tribes acting pursuant to Indian Gaming Regulatory Act in the geographic areas of Bronx, Delaware, Greene, Kings, New York, Orange, Queens, Richmond, Rockland, Sullivan and Ulster Counties and (3) payments to New York State of 20% of the proceeds from slot machines for the first four years of a compact and 25% for the period after four years.

APPENDIX F

Appendix F – Statutes And Constitutional Provisions Involved

U.S.C.A. Const. Art. I § 8, cl. 3 Article I. The Congress Section 8, Clause 3. Regulation of Commerce

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

U.S.C.A. Const. Amend. X Amendment X. Reserved Powers to States

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* * *

New York State Constitution Art. I, Bill of Rights § 9. Right to assemble and petition; judicial divorces; gambling, except pari-mutuel betting, prohibited

1. No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof; nor shall any divorce be granted otherwise than by due judicial proceedings; except as hereinafter provided, no lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, and except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support

of government, shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

2. Notwithstanding the foregoing provisions of this section, any city, town or village within the state may by an approving vote of the majority of the qualified electors in such municipality voting on a proposition therefor submitted at a general or special election authorize, subject to state legislative supervision and control, the conduct of one or both of the following categories of games of chance commonly known as: (a) bingo or lotto, in which prizes are awarded on the basis of designated numbers or symbols on a card conforming to numbers or symbols selected at random; (b) games in which prizes are awarded on the basis of a winning number or numbers, color or colors, or symbol or symbols determined by chance from among those previously selected or played, whether determined as the result of the spinning of a wheel, a drawing or otherwise by chance. If authorized, such games shall be subject to the following restrictions, among others which may be prescribed by the legislature: (1) only bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations shall be permitted to conduct such games; (2) the entire net proceeds of any game shall be exclusively devoted to the lawful purposes of such organizations; (3) no person except a bona fide member of any such organization shall participate in the management or operation of such game; and (4) no person shall receive any remuneration for participating in the management or operation of any such game. Unless otherwise provided by law, no single prize shall exceed two hundred fifty dollars, nor shall any series of prizes on one occasion aggregate more than one thousand dollars. The legislature shall pass appropriate laws to effectuate

the purposes of this subdivision, ensure that such games are rigidly regulated to prevent commercialized gambling, prevent participation by criminal and other undesirable elements and the diversion of funds from the purposes authorized hereunder and establish a method by which a municipality which has authorized such games may rescind or revoke such authorization. Unless permitted by the legislature, no municipality shall have the power to pass local laws or ordinances relating to such games. Nothing in this section shall prevent the legislature from passing laws more restrictive than any of the provisions of this section.

* * *

25 U.S.C.A. § 2701 Title 25. Indians § 2701. Findings

The Congress finds that--

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

* * *

25 U.S.C.A. § 2702 Title 25. Indians Chapter 29. Indian Gaming Regulation

The purpose of this chapter is--

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

* * *

25 U.S.C.A. § 2703 Title 25. Indians Chapter 29. Indian Gaming Regulation § 2703. Definitions

For purposes of this chapter--

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means--

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)--

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that--

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include--

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.
(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

* * *

25 U.S.C.A. § 2710 Title 25. Indians Chapter 29. Indian Gaming Regulation § 2710. Tribal gaming ordinances

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and
(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(7) (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the

introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and
(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe [FN2] to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact

that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and
(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

* * *

Chapter 383 of the New York Laws of 2001

2001 NY S.B. 58208 (SN)
NEW YORK BILL TEXT
VERSION: Introduced
October 24, 2001

A176

Committee on Rules

AN ACT directing the **New York power authority** to **provide** * * * to amend the executive law, the state finance law, the penal law and the general municipal law, in relation to certain gaming (Part B);

TEXT:

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

PART B

Section 1. Legislative intent. The state legislature finds that the state has a significant interest, subject to negotiation, that the provisions of a tribal-state compact contain terms consistent with certain state laws, including, but not limited to, the labor law, the workers' compensation law, and the human rights law which provide for the granting of benefits, rights and privileges which improve the economic quality of life and personal safety of persons who either: (i) will be engaged in the construction, reconstruction, development, rehabilitation, or maintenance of any such facility which will be the site where such gaming activities are to be conducted, or which are related facilities used to facilitate patronage at the gaming facility; or (ii) will be employed, within any such gaming or related facility, either by the Indian tribe or by any person, corporation, firm or entity engaged by the Indian tribe, to operate, administer or manage any such gaming or related facility. The classification of employees hereinbefore referred to shall include, but not necessarily be limited to, employees engaged in: guest entertainment, security, grounds keeping, gaming activities (limited to slot change employees, booth cashiers, carousel attendants and casino food and beverage service employees), reservations, parking and other guest services, the preparation or service of food and beverages; the rendering of housekeeping, maintenance, cleaning, bell and door services; and those engaged in the provision of laundry services for guests at the gaming facility or any related facility which is used to facilitate patronage at the gaming facility. Persons who are

not such employees but who are engaged in the construction, reconstruction, development, rehabilitation or maintenance of any such gaming or related facility should also be extended the protections listed above. Moreover, the legislature finds that gaming should be conducted in a manner which adequately protects the environment and the public health and safety, which is a stated requirement for the conduct of class III gaming activities pursuant to the Indian Gaming Regulatory Act.

Section 2. The executive law is amended by adding a new section 12 to read as follows:

<<+ Section 12. TRIBAL-STATE COMPACT. (A) NOTWITHSTANDING ANY OTHER LAW, THE STATE, THROUGH THE GOVERNOR, MAY EXECUTE A TRIBAL-STATE COMPACT WITH THE SENECA NATION OF INDIANS PURSUANT TO THE INDIAN GAMING REGULATORY ACT OF 1988 (P.L. 100-497; 25 U.S.C. SSSS 2701-2721 AND 18 U.S.C. SSSS 1166-1168) CONSISTENT WITH A MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNOR AND THE PRESIDENT OF THE SENECA NATION OF INDIANS EXECUTED ON JUNE TWENTIETH, TWO THOUSAND ONE AND FILED WITH THE DEPARTMENT OF STATE ON JUNE TWENTY-FIRST, TWO THOUSAND ONE. SUCH TRIBAL-STATE COMPACT SHALL BE DEEMED RATIFIED BY THE LEGISLATURE UPON THE GOVERNOR'S CERTIFICATION TO THE TEMPORARY PRESIDENT OF THE SENATE, THE SPEAKER OF THE ASSEMBLY, AND THE SECRETARY OF STATE, THAT SUCH COMPACT, THROUGH ITS TERMS, BY A MEMORANDUM OF UNDERSTANDING OR OTHER AGREEMENT BETWEEN THE STATE AND NATION, BY A NATION'S ORDINANCE OR RESOLUTION, BY

STATUTE, BY EXECUTIVE ORDER, OR BY THE TERMS OF ANY OTHER AGREEMENT ENTERED INTO BY OR ON BEHALF OF THE NATION, PROVIDES: (I) ASSURANCES THAT THE NATION WILL PROVIDE (1) REASONABLE ACCESS TO THE GAMING AND RELATED FACILITIES TO LABOR UNION ORGANIZERS FOR PURPOSES OF A CAMPAIGN TO SOLICIT EMPLOYEE SUPPORT FOR LABOR UNION REPRESENTATION; (2) PERMISSION FOR LABOR UNION ORGANIZERS TO DISTRIBUTE LABOR UNION AUTHORIZATION CARDS ON SITE FOR THE PURPOSE OF SOLICITING EMPLOYEE SUPPORT FOR LABOR UNION REPRESENTATION; AND (3) RECOGNITION OF LABOR UNIONS AS THE EXCLUSIVE COLLECTIVE BARGAINING REPRESENTATIVES OF EMPLOYEES IN APPROPRIATE BARGAINING UNITS BASED UPON A DEMONSTRATION OF MAJORITY EMPLOYEE SUPPORT OF SUCH LABOR UNIONS BY UNION AUTHORIZATION CARD CHECK AS VERIFIED, IF NECESSARY, BY AN INDEPENDENT ARBITRATOR APPOINTED BY THE STATE EMPLOYMENT RELATIONS BOARD IN CONSULTATION WITH THE NATION AND THE LABOR UNION; (II) ASSURANCES THAT THE NATION HAS AN ADEQUATE CIVIL RECOVERY SYSTEM WHICH GUARANTEES FUNDAMENTAL DUE PROCESS TO VISITORS AND GUESTS OF THE FACILITY AND RELATED FACILITIES; AND (III) ASSURANCES THAT THE NATION WILL MAINTAIN DURING THE TERM OF THE COMPACT SUFFICIENT LIABILITY INSURANCE TO ASSURE THAT VISITORS AND GUESTS WILL BE COMPENSATED FOR THEIR INJURIES. +>>

<<+ (B) NOTWITHSTANDING ANY OTHER LAW, THE

STATE, THROUGH THE GOVERNOR, MAY EXECUTE TRIBAL-STATE COMPACTS PURSUANT TO THE INDIAN GAMING REGULATORY ACT OF 1988 (P.L. 100-497; 25 U.S.C. SSSS 2701-2721 AND 18 U.S.C. SSSS 1166-1168) AUTHORIZING UP TO THREE CLASS III GAMING FACILITIES IN THE COUNTIES OF SULLIVAN AND ULSTER. SUCH TRIBAL-STATE COMPACT SHALL BE DEEMED RATIFIED BY THE LEGISLATURE UPON THE GOVERNOR'S CERTIFICATION TO THE TEMPORARY PRESIDENT OF THE SENATE, THE SPEAKER OF THE ASSEMBLY AND THE SECRETARY OF STATE, THAT SUCH COMPACT, THROUGH ITS TERMS, BY A MEMORANDUM OF UNDERSTANDING OR OTHER AGREEMENT BETWEEN THE STATE AND NATION, BY A NATION'S ORDINANCE OR RESOLUTION, BY STATUTE, BY EXECUTIVE ORDER, OR BY THE TERMS OF ANY OTHER AGREEMENT ENTERED INTO BY OR ON BEHALF OF THE NATION, PROVIDES: (I) ASSURANCES THAT THE NATION WILL PROVIDE (1) REASONABLE ACCESS TO THE GAMING AND RELATED FACILITIES TO LABOR UNION ORGANIZERS FOR PURPOSES OF A CAMPAIGN TO SOLICIT EMPLOYEE SUPPORT FOR LABOR UNION REPRESENTATION; (2) PERMISSION FOR LABOR UNION ORGANIZERS TO DISTRIBUTE LABOR UNION AUTHORIZATION CARDS ON SITE FOR THE PURPOSE OF SOLICITING EMPLOYEE SUPPORT FOR LABOR UNION REPRESENTATION; (3) PROVISION OF EMPLOYEES' NAMES AND ADDRESSES TO LABOR UNION REPRESENTATIVES AND TRIBAL/EMPLOYER/MANAGEMENT NEUTRALITY IN LABOR UNION ORGANIZING CAMPAIGNS; (4) RECOGNITION OF LABOR UNIONS AS THE EXCLUSIVE

COLLECTIVE BARGAINING REPRESENTATIVES OF EMPLOYEES IN APPROPRIATE BARGAINING UNITS BASED UPON A DEMONSTRATION OF MAJORITY EMPLOYEE SUPPORT OF SUCH LABOR UNIONS BY UNION AUTHORIZATION CARD CHECK AS VERIFIED, IF NECESSARY, BY AN INDEPENDENT ARBITRATOR APPOINTED BY THE STATE EMPLOYMENT RELATIONS BOARD IN CONSULTATION WITH THE NATION AND THE LABOR UNION; AND (5) FINAL AND BINDING ARBITRATION OF ORGANIZED LABOR MATTERS OR DISPUTES INCLUDING NEGOTIATIONS FOR COLLECTIVE BARGAINING AGREEMENTS WITH ARBITRATORS' AWARDS ENFORCEABLE IN A STATE OR FEDERAL COURT OF COMPETENT JURISDICTION; (II) ASSURANCES THAT THE NATION HAS AN ADEQUATE CIVIL RECOVERY SYSTEM WHICH GUARANTEES FUNDAMENTAL DUE PROCESS TO VISITORS AND GUESTS OF THE FACILITY AND RELATED FACILITIES; AND (III) ASSURANCES THAT THE NATION WILL MAINTAIN DURING THE TERM OF THE COMPACT SUFFICIENT LIABILITY INSURANCE TO ASSURE THAT VISITORS AND GUESTS WILL BE COMPENSATED FOR THEIR INJURIES. +>>

<<+ (C) EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED IN THE COMPACT, THE STATE SPECIFICALLY RESERVES ALL ITS RIGHTS, AS ATTRIBUTES OF ITS INHERENT SOVEREIGNTY, RECOGNIZED BY THE TENTH AND ELEVENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO AFFECT THE EXISTING AUTHORITY OF THE GOVERNOR UNDER THE CONSTITUTION AND

LAWS OF THIS STATE TO EXECUTE TRIBAL-STATE COMPACTS. +>>

Section 3. The state finance law is amended by adding a new section 99-h to read as follows:

<<+ Section 99-H. TRIBAL-STATE COMPACT REVENUE ACCOUNT. 1. THERE IS HEREBY ESTABLISHED IN THE JOINT CUSTODY OF THE COMPTROLLER AND THE COMMISSIONER OF TAXATION AND FINANCE AN ACCOUNT IN THE MISCELLANEOUS SPECIAL REVENUE FUND TO BE KNOWN AS THE "TRIBAL-STATE COMPACT REVENUE ACCOUNT". +>>

<<+ 2. SUCH ACCOUNT SHALL CONSIST OF ALL REVENUES RESULTING FROM TRIBAL-STATE COMPACTS EXECUTED PURSUANT TO ARTICLE TWO OF THE EXECUTIVE LAW. +>>

<<+ 3. MONEYS OF THE ACCOUNT, FOLLOWING APPROPRIATION BY THE LEGISLATURE, SHALL BE AVAILABLE FOR PURPOSES INCLUDING BUT NOT LIMITED TO: (A) REIMBURSEMENTS OR PAYMENTS TO MUNICIPAL GOVERNMENTS THAT HOST TRIBAL CASINOS PURSUANT TO A TRIBAL-STATE COMPACT FOR COSTS INCURRED IN CONNECTION WITH SERVICES PROVIDED TO SUCH CASINOS OR ARISING AS A RESULT THEREOF, FOR ECONOMIC DEVELOPMENT OPPORTUNITIES AND JOB EXPANSION PROGRAMS AUTHORIZED BY THE EXECUTIVE LAW; PROVIDED, HOWEVER, THAT FOR ANY GAMING FACILITY LOCATED IN THE COUNTY OF ERIE OR

NIAGARA, THE MUNICIPAL GOVERNMENTS HOSTING THE FACILITY SHALL COLLECTIVELY RECEIVE A MINIMUM OF TWENTY-FIVE PERCENT OF THE NEGOTIATED PERCENTAGE OF THE NET DROP FROM ELECTRONIC GAMING DEVICES THE STATE RECEIVES PURSUANT TO THE COMPACT AND PROVIDED FURTHER THAT FOR ANY GAMING FACILITY LOCATED IN THE COUNTY OF CATTARAUGUS, THE MUNICIPAL GOVERNMENTS OF THE STATE HOSTING THE FACILITY SHALL COLLECTIVELY RECEIVE A MINIMUM OF FIFTEEN PERCENT OF THE NEGOTIATED PERCENTAGE OF THE NET DROP FROM ELECTRONIC GAMING DEVICES THE STATE RECEIVES PURSUANT TO THE COMPACT; AND (B) SUPPORT AND SERVICES OF TREATMENT PROGRAMS FOR PERSONS SUFFERING FROM GAMBLING ADDICTIONS. MONEYS NOT APPROPRIATED FOR SUCH PURPOSES SHALL BE TRANSFERRED TO THE GENERAL FUND FOR THE SUPPORT OF GOVERNMENT DURING THE FISCAL YEAR IN WHICH THEY ARE RECEIVED. +>>

Section 4. Section 225.30 of the penal law, subdivision 3 as added by chapter 632 of the laws of 1987, is amended to read as follows:

Section 225.30 Possession of a gambling device.

A. A person is guilty of possession of a gambling device when, with knowledge of the character thereof, he <<+ OR SHE +>> manufactures, sells, transports, places or possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody or use of:

1. A slot machine, <<+ UNLESS SUCH POSSESSION IS

PERMITTED PURSUANT TO ARTICLE NINE-A OF THE GENERAL MUNICIPAL LAW; +>> or

2. Any other gambling device, believing that the same is to be used in the advancement of unlawful gambling activity <<- . ->> <<+ ; OR +>>

3. A coin operated gambling device with intent to use such device in the advancement of unlawful gambling activity.

<<+ B. POSSESSION OF A SLOT MACHINE SHALL NOT BE UNLAWFUL WHERE SUCH POSSESSION AND USE IS PURSUANT TO A GAMING COMPACT, DULY EXECUTED BY THE GOVERNOR AND AN INDIAN TRIBE OR NATION, UNDER THE INDIAN GAMING REGULATORY ACT, AS CODIFIED AT 25 U.S.C. SSSS 2701-2721 AND 18 U.S.C SSSS 1166-1168, WHERE THE USE OF SUCH SLOT MACHINE OR MACHINES IS CONSISTENT WITH SUCH GAMING COMPACT AND WHERE THE STATE RECEIVES A NEGOTIATED PERCENTAGE OF THE NET DROP (DEFINED AS GROSS MONEY WAGERED AFTER PAYOUT, BUT BEFORE EXPENSES) FROM ANY SUCH SLOT MACHINE OR MACHINES. +>>

Possession of a gambling device is a class A misdemeanor.

Section 5. Subdivision 3 of section 186 of the general municipal law, as amended by chapter 337 of the laws of 1998, is amended to read as follows:

3. "Games of chance" shall mean and include only the games known as "merchandise wheels", "coin boards", "merchandise

boards", "seal cards", "raffles", and "bell jars" and such other specific games as may be authorized by the board, in which prizes are awarded on the basis of a designated winning number or numbers, color or colors, symbol or symbols determined by chance, but not including games commonly known as "bingo or lotto" which are controlled under article fourteen-H of this chapter and also not including <<- "slot machines", ->> "bookmaking", "policy or numbers games" and "lottery" as defined in section 225.00 of the penal law. No game of chance shall involve wagering of money by one player against another player.

Section 6. This act shall take effect immediately; provided, that, subdivision (a) of section 12 of the executive law as added by section two of this act shall expire and be deemed repealed if a tribal-state compact between the state of New York and the Seneca Nation of Indians has not been executed within two years of the date on which this act shall have become a law; provided that the secretary of state shall notify the legislative bill drafting commission upon the occurrence of the certification provided for in section two of this act in order that the commission may maintain an accurate and timely effective data base of the official text of the laws of the state of New York in furtherance of effecting the provisions of section 44 of the legislative law and section 70-b of the public officers law.

Supreme Court, U.S.
FILED
OCT 20 2005
OFFICE OF THE CLERK

Nos. 05-361 & 05-368

IN THE

Supreme Court of the United States

LEE KARR,

Petitioner,

-and-

JOSEPH DALTON, *et al.*,

Petitioners,

v.

GEORGE PATAKI, GOVERNOR OF NEW YORK, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988), authorizes the conduct of Class III gaming on Indian lands pursuant to a Tribal-State compact where the State permits casino-style gaming "for any purpose by any person," regardless of State law restrictions on such gaming.

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STATEMENT OF THE CASE

Petitioners Lee Karr and Joseph Dalton, *et al.* challenge the constitutionality of a New York statute authorizing the Governor of New York State to enter into four Tribal-State compacts governing gaming on Indian lands, pursuant to the Indian Gaming Regulatory Act ("IGRA"), Pub. L. No. 100-497, 102 Stat. 2467 (1988), *codified at* 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. § 1166 *et seq.* Petitioners contended that the provision at issue violated state constitutional restrictions on gaming, and that IGRA did not preempt these restrictions. The New York Court of Appeals rejected these arguments, holding that IGRA preempts state law with respect to gaming on Indian lands, and that because New York law permits casino-style gaming for certain purposes by certain persons, IGRA authorizes such gaming on Indian lands pursuant to a Tribal-State compact.[1]

A. Statutory Background

IGRA, the federal statute that defines the scope of state regulatory authority over Indian gaming, was enacted in response to this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). There, the Court held that under then existing federal law, the State of California lacked authority to enforce on Indian reservations state law regulating the playing of bingo. "[T]ribal

1. Petitioners also challenged two other provisions, which authorize the use of video lottery terminals at certain parimutuel racetracks and the State's participation in the multi-state "Mega Millions" lottery. The New York Court of Appeals rejected these challenges on state law grounds. Petitioners seek review by this Court only of that aspect of the decision below regarding Tribal-State compact negotiations.

sovereignty," the Court explained, "is dependent on, and subordinate to, only the Federal Government, not the States. It is clear, however, that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *Id.* at 207 (internal quotation marks and citation omitted).

Under federal law, the Court determined, the applicability of state law on Indian reservations turned on whether the law to be applied was "criminal/prohibitory" or "civil/regulatory." Criminal/prohibitory state laws, which "generally . . . prohibit certain conduct," could be enforced on reservations; civil/regulatory laws, which "generally permit[] the conduct at issue, subject to regulation," could not be. *Id.* at 209. California's gaming laws, which permitted bingo if net proceeds were used for charitable purposes, and which authorized a state-run lottery, were held to be civil/regulatory and therefore unenforceable: "In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular." *Id.* at 211. Thus, under *Cabazon Band*, state regulatory authority over Indian gaming was quite constrained; unless state law banned gaming activities altogether, it was unenforceable as to gaming on Indian lands.

IGRA, which was enacted the following year, preempts state law in the field of Indian gaming. It makes *Cabazon Band*'s criminal/prohibitory-civil/regulatory distinction the touchstone of whether, as a matter of *federal* law, casino-style gaming will be permitted on Indian lands.

See S. Rep. No. 446, 100th Cong., 2d Sess. 6 ("S. Rep."), *reprinted in* 1988 U.S. Code Cong. & Adm. News ("U.S.C.C.A.N.") 3071, 3076. Specifically, IGRA provides that such gaming "shall be lawful on Indian lands" if, among other factors, the lands are "located in a State that permits such gaming for any purpose by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B).

IGRA nonetheless gives the States a means to influence the conduct of casino-style gaming (denominated in the statute as "Class III" gaming) on Indian lands — the type of gaming at issue here.[2] IGRA requires that such gaming be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(C). Through the compacting process, Tribes and States may negotiate and agree upon regulatory, jurisdictional, and other issues pertaining to the conduct of Class III gaming on Indian lands.

Upon request by a Tribe, "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A). IGRA creates a federal cause of action against States that fail to negotiate in good faith. 25 U.S.C. § 2710(d)(7)(A). However, because IGRA does not abrogate the States' Eleventh Amendment immunity, no such action may proceed to judgment against an unconsenting State. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). States that decline to participate in the compacting process, however, ultimately forfeit the opportunity to influence Class III gaming, and the terms of such gaming

2. Class III gaming includes any "house banking game," such as blackjack, roulette, and baccarat, as well as parimutuel horse and dog racing, lotteries, and certain other games. 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4.

will be prescribed by the Secretary of the Interior. 25 U.S.C. § 2710(d)(7)(B)(vii); 25 C.F.R. pt. 291.

In October 1993, then Governor Cuomo entered into the "Tribal-State Compact Between the St. Regis Mohawk Tribe and the State of New York," which set forth terms for the conduct of Class III gaming on the Akwesasne Reservation in Franklin County, New York. That compact was subsequently invalidated by the New York Court of Appeals because it had been entered into without legislative authorization. *See Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y. 2d 801, 798 N.E.2d 1047 (2003).

The statute challenged in this litigation, New York Executive Law § 12, provides the legislative authorization for Tribal-State compacts that was deemed necessary by the Court of Appeals in *Saratoga*. Enacted in October 2001, the statute authorizes the Governor, on behalf of the State, to execute up to four Tribal-State compacts pursuant to IGRA. The compacts are deemed ratified upon the Governor's certification of certain enumerated conditions concerning protections for labor unions and visitors to gaming facilities. *See* N.Y. Exec. Law § 12.

B. Procedural History

Petitioners commenced two separate actions, later consolidated, in New York Supreme Court, Albany County, alleging that New York Executive Law § 12 violates Article I, § 9 of the state Constitution. That provision prohibits some gaming, but allows, subject to certain restrictions, state-run lotteries, parimutuel horse racing, and gaming conducted by religious or charitable organizations. N.Y. Const. art. I, § 9.

On cross-motions for summary judgment, Supreme Court dismissed the complaints. *See* Dalton Pet. App. at 132a-144a. The trial court's grant of summary judgment on the compacting provision was affirmed by the intermediate appellate court, *see id.* at 76a-131a, and by the New York Court of Appeals, *see id.* at 6a-75a. The state Court of Appeals first noted that IGRA "'expressly preempt[s] the field in the governance of gaming activities on Indian lands.'" *Id.* at 15a (quoting S. Rep. at 6, 1988 U.S.C.C.A.N. at 3076). While Tribal-State compacts negotiated pursuant to IGRA provide States some measure of influence over Class III gaming, the court noted, IGRA does not permit States to unilaterally regulate Indian gaming activities. *Id.* at 14a.

In light of IGRA's provision stating that Class III gaming is permitted on Indian lands in States that allow such gaming "for any purpose by any person," 25 U.S.C. § 2710(d)(1)(B), the court determined that "[s]ince New York allows some forms of Class III gaming — for charitable purposes — such gaming may lawfully be conducted on Indian lands" so long as IGRA's remaining requirements are satisfied. Dalton Pet. App. at 16a. As for petitioners' suggestion that IGRA may not, consistent with the Tenth Amendment, compel a State to enter a Tribal-State compact, the court explained that entry into a compact is indeed optional for a State. It is, however, an option "to be favored" because States that decline to participate in compact negotiations forego any influence over the conduct of Class III gaming on Indian lands. *Id.* at 17a-19a.

Petitioners filed motions for reargument, which were denied by order dated July 6, 2005. *Id.* at 1a. These petitions followed.

REASONS FOR DENYING THE PETITIONS

Petitioner Dalton's contention that there is widespread conflict among appellate courts regarding the extent of IGRA preemption rests primarily on a purported conflict between the New York Court of Appeals' decision below and the California Supreme Court's decision in *Hotel Employees and Restaurant Employees International Union v. Davis*, 21 Cal. 4th 585, 981 P.2d 990 (1999) ("*H.E.R.E.*"). But the state constitutional provision applied in *H.E.R.E.* has been amended for the specific purpose of nullifying *H.E.R.E.*'s result. For all relevant purposes, *H.E.R.E.* thus has no continuing force or effect.

The other cases relied on by petitioner Dalton present no conflict with the New York Court of Appeals' decision in either reasoning or result. Indeed, apart from *H.E.R.E.*, all of the cases cited by petitioner as evidence of a putative conflict are in broad agreement with the New York Court of Appeals' view of IGRA and its preemptive effect.

Both petitioners' remaining arguments boil down to the claim that the New York Court of Appeals incorrectly applied settled law and principles of federalism. The decision below, however, was fully consistent with the precedent of this Court. In any event, petitioners' request for error correction does not merit this Court's attention.

I. PETITIONERS HAVE NOT IDENTIFIED A CONFLICT THAT MERITS THIS COURT'S REVIEW

A. The California Supreme Court Decision on which Petitioner Dalton Primarily Relies Has Been Nullified by Constitutional Amendment.

Petitioner Dalton suggests that this Court's review is necessary to resolve a putative conflict between the New York Court of Appeals' decision and *H.E.R.E.* — a California Supreme Court decision that has no continuing force or effect. Dalton Pet. at 11-13. *H.E.R.E.* concerned a challenge to a California statutory initiative directing the governor to enter into certain Tribal-State compacts pursuant to IGRA. The California Supreme Court invalidated the statute, finding it in violation of a state constitutional provision prohibiting "casinos of the type currently operating in Nevada and New Jersey." Cal. Const. art. IV, § 19(e). Despite the express statements in IGRA's text and legislative history indicating Congress's intent to preempt state regulation of Indian gaming, the court held that "IGRA does not exempt gambling on Indian lands from state regulatory laws," and concluded that the state Constitution prohibited California from entering into Tribal-State compacts as directed by the statute. *See H.E.R.E.*, 21 Cal. 4th at 611-12, 981 P.2d at 1008-09.

In March 2000, approximately seven months after *H.E.R.E.* was decided, California voters ratified Proposition 1A, which amended the state Constitution for the specific purpose of nullifying *H.E.R.E.*'s result. As amended, the California Constitution expressly authorizes the governor "to negotiate and conclude compacts, subject to ratification by the Legislature," for the conduct of certain Class III gaming

on Indian lands. Cal. Const. art. IV, § 19(f). It further provides that such gaming is "hereby permitted to be conducted and operated on tribal lands subject to those compacts." *Id.* Since the amendment was ratified, California has entered into at least sixty-two Tribal-State compacts, and "[c]asinos have become the main source of revenue for Indian tribes in California." *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 718 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 51 (2004).

Because the California Constitution can no longer be read to prevent Class III gaming on Indian lands nor prohibit California from entering Tribal-State compacts, *H.E.R.E.* is for all relevant purposes a nullity. A purported "conflict" with a decision that has no continuing force or effect is not a compelling reason meriting this Court's review. *See Yee v. City of Escondido, California*, 503 U.S. 519, 537-38 (1992).[3]

B. The Remaining Cases Relied on by Petitioner Dalton in No Way Conflict with the Decision Below.

Apart from *H.E.R.E.*, petitioner Dalton points to four categories of cases that are putatively in conflict with the

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3. It is far from clear that *H.E.R.E.* was ever actually in conflict with the decision below. The statute invalidated in *H.E.R.E.* directed the governor to enter into Tribal-State compacts for the conduct of, *inter alia*, "banked" casino-style gaming — Class III gaming that was then categorically prohibited by the California Constitution for all purposes and by all persons. *See H.E.R.E.*, 21 Cal. 4th at 605-09, 981 P.2d at 1004-07. Thus, the compacts entered into pursuant to that statute would have resulted in Class III gaming not actually authorized by IGRA. *See* 25 U.S.C. § 2710(d)(1)(B). The New York Constitution, in contrast, permits the playing of a wide variety of banked casino-style Class III games by charitable or religious organizations.

decision below: (1) state high court decisions concluding, as the New York Court of Appeals did in *Saratoga*, that a governor may not enter a Tribal-State compact without legislative authorization; (2) *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 878 (2005), which did not even address IGRA's Tribal-State compact procedure; (3) decisions from the Eighth and Tenth Circuits recognizing, as the New York Court of Appeals did below, that IGRA does not compel a State to enter a Tribal-State compact; and (4) federal appellate decisions concerning an issue that the court below expressly declined to reach. None of these cases conflicts with the decision below in any respect.

Petitioner Dalton first relies on three state Supreme Court decisions, *Srader v. Verant*, 1998-NMSC-25, 125 N.M. 521, 964 P.2d 82 (1998); *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992); and *Narragansett Indian Tribe of Rhode Island v. Rhode Island*, 667 A.2d 280 (R.I. 1995). *See* Dalton Pet. at 12. Those cases held (or reaffirmed) that a governor may not execute a Tribal-State compact on behalf of a State without legislative authorization to do so. The New York Court of Appeals held precisely the same thing in *Saratoga* — which the decision below recognizes as good law, *see* Dalton Pet. App. at 7a, 20a; indeed, in *Saratoga*, the court expressly noted its agreement with the very decisions that petitioners cite as giving rise to a putative conflict. *See Saratoga*, 100 N.Y.2d at 824, 798 N.E.2d at 1061 (noting that the New York Court of Appeals "join[s]" New Mexico, Kansas, and Rhode Island in concluding that Tribal-State compacts require legislative authorization).

Petitioner Dalton next relies on *Lac Courte Oreilles*, *see* Dalton Pet. at 12-13, in which the Seventh Circuit upheld a provision of IGRA making Class III gaming on "after-acquired lands" — *i.e.*, Indian lands acquired after IGRA's enactment — conditional on the concurrence of the governor of the State in which the gaming is to occur. *See* 25 U.S.C. § 2719(b)(1)(A). The plaintiff Tribes had argued that because the decision to permit gaming on after-acquired lands is a legislative function, IGRA offended principles of federalism by vesting that function in a state executive officer. The Seventh Circuit explained that "Wisconsin has already established [a gaming policy] through legislation and amendments to the Wisconsin Constitution." *Lac Courte Oreilles*, 367 F.3d at 664. The governor's decision whether to concur to a proposal for gaming on after-acquired lands, the court concluded, "will be informed by the [State's existing] public policy" — a "policy of tolerating gaming on Indian lands" despite Wisconsin's prohibition of casino gaming elsewhere in the State. *Id.* Thus, not only did *Lac Courte Oreilles* say nothing about whether state-law gaming restrictions prevent a State from entering into Tribal-State compacts under IGRA, but its view of the interplay between IGRA and state gaming policy is fully consistent with the decision below.

Third, petitioner Dalton points to *Ponca Tribe of Oklahoma v. Oklahoma*, 37 F.3d 1422 (10th Cir. 1994), *vacated and remanded*, 517 U.S. 1129 (1996); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); and *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292 (D. Ariz. 1992), as conflicting with the decision below. *See* Dalton Pet. at 13. Petitioner concedes that these cases address not the question squarely presented here but only "closely related issues" — *i.e.*, "that states are not required under IGRA to enter into compacts

with Indian tribes" and that such a requirement, if imposed, would violate the Tenth Amendment. Dalton Pet. at 13. In any event, these decisions are in complete accord with the New York Court of Appeals' view that a State is not compelled to enter a Tribal-State compact, and that if it declines to do so, the terms of Class III gaming on Indian lands would be prescribed without the State's involvement. *See* Dalton Pet. App. at 17a-19a.[4]

Finally, petitioner Dalton contends that "[o]ther circuits have disagreed" not with the decision below but with a Second Circuit decision sometimes read to mean that if a State permits any form of Class III gaming, it must negotiate over all forms of Class III gaming. Dalton Pet. at 13-14; *see also Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030-31 (2d Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); *Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1310-11 (10th Cir. 2004) (noting disagreement). Because the New York Court of Appeals expressly declined to reach this question, *see* Dalton Pet. App. at 16a n.4, any conflict over it cannot serve as grounds for granting certiorari in this case.[5]

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4. Because the New York Court of Appeals determined that IGRA does not compel a State to enter a Tribal-State compact, it did not comment on whether such a requirement, if imposed, would violate the Tenth Amendment. *See* Dalton Pet. App. at 17a-19a.

5. Petitioner Dalton notes that this Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. __, 125 S. Ct. 1478 (2005) "makes it abundantly clear that state regulatory laws do apply to land that may be owned by Indians in fee simple but which does not enjoy 'reservation' or 'land in trust' status." Dalton Pet. at 11 n.4.

(Cont'd)

II. THE DECISION BELOW WAS CORRECT

Despite petitioners' lengthy attacks on the merits of the New York Court of Appeals' decision, this case was rightly decided below. First, petitioners contend that IGRA unconstitutionally compels States in which Class III gaming is permitted to participate in a federal regulatory program. *See* Dalton Pet. at 2-5, 19-21; Karr Pet. at 2-8, 13-19. No court has agreed with petitioners that IGRA's Tribal-State compact provision violates the Tenth Amendment, and with good reason. IGRA "grants the States a power that they would not otherwise have, viz., some measure of authority over gaming on Indian lands." *Seminole Tribe*, 517 U.S. at 58. But, as the New York Court of Appeals and other courts have concluded, IGRA does not compel a State to use that power. Should a State decline to participate in the compacting process, then the State simply forfeits the opportunity to influence Class III gaming on Indian lands, and the terms of such gaming will be prescribed by the Secretary of the Interior. *See* 25 U.S.C. § 2710(d)(7)(B)(vii); 25 C.F.R. pt. 291; *cf.* Karr Pet. at 16. The Tenth Amendment does not prevent Congress from giving States the option of acting in a field otherwise governed by federal law. *See New York v. United States*, 505 U.S. 144, 167 (1992) (recognizing "Congress' power to offer States the choice of regulating . . . according to federal standards or having state law pre-empted by federal regulation"). IGRA is therefore fully consistent with the Tenth Amendment, as courts have uniformly held.

(Cont'd)
That proposition is of no consequence here. IGRA never purports to authorize Class III gaming on territory other than Indian lands, and the New York Court of Appeals did not suggest otherwise. *See* Dalton Pet. App. at 20a n.6.

See Ponca Tribe, 37 F.3d at 1434; *Cheyenne River*, 3 F.3d at 281.

Second, petitioners argue that New York's constitutional restrictions on for-profit gaming preclude Class III gaming on Indian lands pursuant to a Tribal-State compact, notwithstanding IGRA. *See* Dalton Pet. at 4, 17-18; Karr Pet. at 19-21. To the extent this claim turns on an interpretation of the New York Constitution, it is not appropriately addressed to this Court. To the extent the claim turns on an interpretation of federal law, it is incorrect. State gaming law has no force or effect on Indian lands except insofar as Congress may provide. *Cabazon Band*, 480 U.S. at 207. IGRA was "intended to expressly preempt the field in the governance of gaming activities on Indian lands," S. Rep. at 6, 1988 U.S.C.C.A.N. at 3076, and provides that in States, such as New York, which permit Class III gaming for charitable purposes, such gaming may be conducted on Indian lands. 25 U.S.C. § 2710(d)(1)(B). Thus, contrary to petitioners' assertion, New York state law is not a bar to the conduct of Class III gaming on Indian lands. *See* Dalton Pet. App. at 16a-18a; *Northern Arapaho Tribe*, 389 F.3d at 1311-12; *Mashantucket*, 913 F.2d at 1030-31; *cf. United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358, 365 (8th Cir. 1990).

Third, petitioners urge this Court to hold — "[c]ontrary to the uniform decisions of courts," Karr Pet. at 22 — that IGRA did not incorporate *Cabazon Band*'s criminal/prohibitory-civil/regulatory distinction for Class III gaming. *See* Dalton Pet. at 21-23; Karr Pet. at 21-27. Their position is wrong, *see, e.g.*, Dalton Pet. App. at 15a & n.3; *Mashantucket*, 913 F.2d at 1030; *Coeur d'Alene Tribe v. Idaho*, 842 F. Supp. 1268, 1275 & n.6 (D. Idaho 1994); and

in any event irrelevant. The provenance of IGRA's standard for authorizing Class III gaming is of no consequence. The statutory language is clear: Class III gaming may be conducted on Indian lands "located in a State that permits such gaming for any purpose by any person." 25 U.S.C. § 2710(d)(1)(B). Because New York is undisputedly such a State, Class III gaming may be conducted in New York pursuant to a Tribal-State compact.

Finally, petitioners claim that the question presented is of "great national importance." Dalton Pet. at 15; *see* Karr Pet. at 3 ("critical significance"). To be sure, the opportunity that IGRA provides States to influence the conduct of Class III gaming on Indian lands is critical for the States. But not a single State has joined petitioners to seek review of the decision below. That is unsurprising, since the New York Court of Appeals' understanding of IGRA's preemptive sweep is correct and accords with the views of other federal and state courts regarding whether IGRA in fact compels compact negotiation by States. Thus, petitioners have identified no ground that would warrant this Court's departure from its usual practice of refusing to grant certiorari simply to review the merits of the decision below.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Nos. 05-361 & 05-368

IN THE

Supreme Court of the United States

LEE KARR,

Petitioner,

v.

GEORGE PATAKI, GOVERNOR OF NEW YORK, ET AL.,

Respondents.

JOSEPH DALTON, ET AL.,

Petitioners,

v.

GEORGE PATAKI, GOVERNOR OF NEW YORK, ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The New York Court Of Appeals

BRIEF IN OPPOSITION FOR RESPONDENT PARK PLACE ENTERTAINMENT CORPORATION

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QUESTION PRESENTED

Whether the New York Supreme Court, the New York Appellate Division, Third Department, and the New York Court of Appeals all erred in holding that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701 et seq., preempted the application of New York state law to gaming activities occurring on Indian lands.

PARTIES TO THE PROCEEDINGS

The parties before the New York Court of Appeals included Joseph Dalton, Frank Padavan (individually and in his capacity as a member of the New York State Senate), William Parment (individually and in his capacity as a member of the New York State Assembly), Duane Motley, New Yorkers for Constitutional Freedoms, Ltd., Lee Karr, Mrs. Lee Karr, the Coalition against Casino Gambling, G. Stanford Bratton, the Western New York Coalition Against Casino Gambling, John Ekman, the Presbyterian and New England Congregational Church, Chaskiel Rozenburg, George Pataki (in his capacity as Governor of New York), the State of New York, the New York State Racing and Wagering Board, Park Place Entertainment Corporation (now known as Harrah's Operating Company, Inc.), the New York State Department of Taxation and Finance (Division of the Lottery), Arthur J. Roth (in his capacity as Commissioner of Taxation and Finance of the State of New York), the New York Racing Association, the Finger Lakes Racing Association, Yonkers Racing Corporation, Mid-State Raceway, Inc., and Monticello Raceway Management Inc.

RULE 29.6 STATEMENT

Respondent Park Place Entertainment Corporation, which name was changed to Caesars Entertainment, Inc., was subsequently acquired and merged into Harrah's Operating Company, Inc., a Delaware corporation with its principal place of business in Nevada. Harrah's Operating Company, Inc. is a wholly-owned subsidiary of Harrah's Entertainment, Inc., a publicly traded company.[1]

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[1] Petitioner Karr incorrectly claims that Park Place (now known as Harrah's Operating Company, Inc.) is the parent corporation of the Hilton Hotel Chain. *See* Karr Pet. ii. There is no accuracy to any part of this allegation.

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BRIEF IN OPPOSITION FOR RESPONDENT PARK PLACE ENTERTAINMENT CORPORATION

Respondent Park Place Entertainment Corporation (now known as Harrah's Operating Company, Inc.) ("Park Place") respectfully submits this brief in opposition to the petitions for a writ of certiorari filed in this case.

OPINIONS AND ORDERS BELOW

The opinion of the New York Court of Appeals (Karr Pet. App. A; Dalton Pet. App. D) is reported at 2005 WL 1017641 (May 3, 2005). The opinion of the New York Appellate Division, Third Department (Karr Pet. App. B; Dalton Pet. App. E) is reported at 11 A.D.3d 62, 780 N.Y.S.2d 47 (3d Dep't 2004). The opinion of the New York Supreme Court (Karr Pet. App. C; Dalton Pet. App. F) is not reported.

JURISDICTION

The judgment of the New York Court of Appeals was entered on May 3, 2005. Timely petitions for rehearing were denied on July 6, 2005, and the instant petitions were docketed on September 20, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT STATUTES AND RULES

25 U.S.C. § 2710(d)(1) provides:

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

STATEMENT OF THE CASE

Petitioners are a collection of anti-gambling interest groups, activists and legislators who seek to invalidate New York State legislation that would permit New York's Governor to enter into tribal-state compacts for the operation of a limited number of Indian gaming casinos in New York State. The claims presented in the instant petitions have been rejected by the New York Supreme Court, by the New York Appellate Division, Third Department, and by the New York Court of Appeals.

At the very most, by their petitions, petitioners have raised an uncomplicated question about federal pre-emption—namely, whether the Indian Gaming Regulatory Act ("IGRA") pre-empts the application of certain state-law limits on gaming to gaming activities occurring on Indian lands. Although petitioners attempt to portray this case as one in which Congress improperly "empowered" state legislatures to enact laws they could not have enacted otherwise, the only question actually presented here is whether New York's general prohibition on "commercial" gambling as it applies to Indian tribes is pre-empted by IGRA—and the answer to this question is plainly yes. Indeed, petitioners' "state sovereignty" arguments ring hollow in light of the fact that IGRA gives the states a power—the ability to exercise some degree of regulation over gaming activities on tribal lands—that they would not otherwise possess under the United States Constitution.

No court, federal or state, has ever accepted the arguments petitioners present here. The decision below does not conflict with any case, and there is simply no reason for this Court to grant review. For these reasons and the other reasons explained here, these petitions should be denied.

• • •

1. Since the days of Chief Justice Marshall, it has been established law that Indian tribes possess powers of inherent sovereignty in our federal system. *See Johnson v. McIntosh*, 21 U.S. 543, 574 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). It is the Federal Government, through the Indian Commerce Clause and its treaty-making power, *see* U.S. Const. Art. I, § 8, cl. 3; *id.* Art. II, § 2, cl. 2, that exercises authority over Indian tribes and their activities. *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973). "The whole intercourse between the United States and [Indian] nation[s], is, by our Constitution and laws, vested in the government of the United States." *Id.* at 169 (quoting *Worcester v. Georgia*, 6 Pet. 515, 561 (1832)).

This Court "has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory,'" and that "'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'" *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) (citations omitted). Thus, the only way "state laws may be applied to tribal Indians on their reservations [is] if Congress has expressly so provided." *Id.*

2. Until the late 1980s, the law was unclear as to the degree to which gaming activities on Indian lands could be regulated by the states. In 1987, this Court squarely addressed this issue in *California v. Cabazon Band of Mission Indians*.

There, pursuant to ordinances approved by the United States Secretary of the Interior, two federally recognized Indian tribes (the Cabazon and Morongo Bands of Mission Indians) conducted bingo and card games on their reservations in California. *See* 480 U.S. at 204-05. The State of California objected to these gaming operations and sought to enforce against the tribes a California statute that imposed prize limits and limited bingo operators to unpaid members of charities. The tribes brought an action seeking an injunction and declaratory judgment that state laws could not be enforced on their reservations. In response, California argued that it had jurisdiction over the tribes pursuant to Public Law 280, which granted states limited criminal jurisdiction over offenses committed on tribal lands. *See id.* at 204-08.

This Court held that whether a state could enforce its law on an Indian reservation depended on whether the law was "criminal/prohibitory" or "civil/regulatory" in nature. *Id.* at 209. The Court determined that if a state law "generally" were to "prohibit certain conduct," it would fall within Public Law 280's grant of jurisdiction and be considered "criminal/prohibitory." *Id.* However, "if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory" and cannot be enforced on Indian land. *Id.* As the Court explained, the fact that a regulatory law is enforceable by both civil and criminal penalties does not make it a criminal law for purposes of jurisdiction. *See id.* at 209, 211.

Applying this analysis to the Indian tribes' activities in California, this Court found that California law permitted a wide variety of gaming activities, including the state lottery, certain card games, pari-mutuel betting on horse races, and bingo. *See id.* at 210-11. Therefore, the Court ruled that because California "regulates rather than prohibits gambling in general and bingo in particular," the Indian tribes were enti-

tled to engage in such gaming activities on their lands, free of regulation by the state. *Id.* at 211.

3. In the wake of this Court's decision in *Cabazon*, in 1988, Congress enacted IGRA, which incorporated *Cabazon*'s "prohibitory/regulatory" distinction.

In enacting IGRA, Congress recognized that "numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue" and that "existing Federal law d[id] not provide clear standards or regulations for [this] conduct." 25 U.S.C. § 2701(1), (3) (2005). Congress also acknowledged "that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands." S. Rep. No. 100-446, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3075.

The primary purpose of IGRA was to address these issues by providing "a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1) (2005). Congress also sought to establish a framework to regulate Indian gaming and to protect the tribes from criminal and other corrupting influences. *See id.* § 2702(2). To accomplish these goals, Congress devised an elaborate scheme by which different types of gaming would be subject to different degrees of regulation. In addition, Congress established the National Indian Gaming Commission ("NIGC") to act as an independent federal authority to regulate gaming on Indian lands. *See id.* § 2702(3).

IGRA divides gaming into three classes. Class I gaming is limited to social games for nominal prizes and traditional tribal ceremonial games, and is subject only to tribal regulation. *See* 25 U.S.C. § 2703(6) (2005). Class II gaming includes bingo and certain non-banking card games. *See id.* § 2703(7)(A). Banking card games such as "blackjack" and

"baccarat," any electronic "game of chance," and "slot machines" are expressly excluded. *Id.* § 2703(7)(B). Class II gaming is generally not subject to state regulation, but it is subject to tribal regulation and oversight by the NIGC. *See id.* § 2710(a)-(c). All other gaming, including casino-style gambling, is classified as Class III gaming. *See id.* § 2703(8).

Under IGRA, Class III gaming is lawful on Indian lands if the gaming activities are authorized by an ordinance or resolution adopted by the Indian tribe and approved by the Chairman of the NIGC, and the state in which the Indian lands are located "permits such gaming for *any* purpose by *any* person, organization, or entity," and that gaming is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." *Id.* § 2710(d)(1) (emphasis added). Any Indian tribe within a state allowing Class III gaming activity may request the state to enter into negotiations for a tribal-state compact. Upon receiving this request, the state shall negotiate with the tribe in good faith. *See id.* § 2710(d)(3)(A).

If the state fails to negotiate in good faith, and the state waives its sovereign immunity from suit, *see Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the tribe may bring an action in federal district court seeking an order compelling the state to conclude a compact. *See* 25 U.S.C. § 2710(d)(7)(A)(i). If such an order is issued, but the state and tribe then fail to conclude a compact, the Secretary of the Interior may promulgate procedures, consistent with IGRA, for the conduct of Class III gaming by the tribe on Indian lands. *See id.* at § 2710(d)(7)(B)(iv) & (vii). If, instead, the state asserts its sovereign immunity to block such a lawsuit, after mediation, the Secretary of the Interior may promulgate "rules for the conduct of Class III Indian gaming" in that state. 25 C.F.R. §§ 291.1 *et seq.* (2005); *see also* 25 U.S.C. § 2710(d)(7)(B)(vii).

4. Although New York once prohibited gambling, New York now permits a wide array of gambling within the state, including state-sponsored lotteries, pari-mutuel betting on horse racing, and "games of chance" conducted by "charitable or non-profit organizations." N.Y. Const. Art. I, § 9. According to statistics available from the New York State Racing and Wagering Board, in 2002 alone, more than $460 million was wagered on charitable gaming activities conducted by 16,149 registered New York charitable organizations, including proceeds from 2,300 licensed "Las Vegas Nights."[2] Similarly, in 2003, $410 million was wagered on charitable gaming activities.[3] In addition, New York has permitted the Oneida Nation to operate the Turning Stone Casino in Verona, New York for the past decade, the St. Regis Mohawks to operate the Akwesasne Mohawk Casino in Franklin County near the Canadian border since 1999, and the Seneca Nation to operate the Seneca Niagara Casino in Niagara Falls for over two years.

5. The instant actions have their origins in *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 798 N.E.2d 1047, 766 N.Y.S.2d 654 (N.Y.), *cert. denied*, 540 U.S. 1017 (2003), a case concerning the authority of the Governor of New York to enter into agreements with Indian tribes to permit casino gaming on their lands. In 1999, Governor Pataki and the St. Regis Mohawk Tribe entered into an agreement to amend a 1993 compact to allow the Mohawks to operate electronic casino gambling devices. Shortly after this amendment took effect, many of the same

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[2] New York State Racing and Wagering Board, Annual Report and Simulcast Report: Calendar Year 2002, at 37-38, *available at* http://www.racing.state.ny.us/about/annual.htm.

[3] New York State Racing & Wagering Board, Annual Report and Simulcast Report: Calendar Year 2003, at Letter from Chairman, *available at* http://www.racing.state.ny.us/about/annual.htm.

plaintiffs here filed complaints against the Governor and other state officials seeking a declaration that the 1993 compact and 1999 amendment were unconstitutional, alleging, among other things, that the Governor lacked the authority to enter into tribal-state compacts without prior legislative approval. The Governor contended that because IGRA preempted New York's laws against gambling, he did not need legislative authorization to enter into a tribal-state compact.

The Court of Appeals of the State of New York affirmed the decisions of the lower courts and invalidated the compact, finding that "[d]ecisions involving licensing, taxation and criminal and civil jurisdiction require a balancing of differing interests, a task the multi-member, representative Legislature is entrusted to perform under our constitutional structure." *Saratoga*, 100 N.Y.2d at 823, 798 N.E.2d at 1060, 766 N.Y.S.2d at 667. Noting that "the lower courts did not cite, let alone address, *Cabazon* or other possibly relevant cases," the court stated that "further development of the issue by the courts below is desirable, if not necessary." *Id.* at 825, 798 N.E.2d at 1062, 766 N.Y.S.2d at 669.

6. The legislation at issue here, Part B of Chapter 383 of the Laws of 2001 ("Part B"), was enacted in the aftermath of September 11, 2001 to address New York's immediate need for new sources of revenue. The Legislature found that "casinos will bring additional business and income to the economically depressed areas that agreed to host the facilities." (Record on Appeal at 363.) By enacting Part B, the New York Legislature responded to this need and the concerns of the Court of Appeals in *Saratoga* and provided the Governor with express authorization and guidelines for the execution of a limited number of tribal-state compacts.

On January 29, 2002, the Dalton and Karr petitioners filed these actions alleging, among other things, that Part B is "illegal and unconstitutional" because it violates the New York State Constitution, the United States Constitution, and

IGRA. On February 15, 2002, the parties in this action consented to Park Place's intervention as a defendant with respect to the claims involving Part B.

On July 17, 2003, the trial court granted summary judgment in defendants' favor and dismissed these complaints in their entirety. *See* Karr Pet. App. C; Dalton Pet. App. F. On July 7, 2004, the Appellate Division, Third Department, unanimously affirmed the trial court's opinion as to Part B and declared that provision to be constitutional. The Appellate Division held that because New York "'permits such gaming for any purpose by any person, organization or entity,' . . . the class III gaming at issue is properly the subject of a tribal-state compact and part B of chapter 383 of the Laws of 2001 authorizing the Governor to enter into such compacts is consistent with both IGRA and N.Y. Constitution, article I, § 9." *Dalton v. Pataki*, 11 A.D.3d 62, 83, 780 N.Y.S.2d 47, 64 (3d Dep't 2004), *aff'd*, 2005 WL 1017641 (N.Y. 2005).

On May 3, 2005, the New York Court of Appeals affirmed the decisions of the lower courts with respect to Part B and declared it constitutional in all respects. *See* Karr Pet. App. A; Dalton Pet. App. D. In its 6-1 decision, the court correctly found that "the State Constitutional prohibition against commercial gambling does not apply to Indian lands that are in compliance with IGRA and governed by a valid tribal-state compact." Karr Pet. App. A at A13; Dalton Pet. App. D at 17a. The court recognized that, "[t]hrough IGRA, Congress has preempted the states in this area. Since New York allows some forms of Class III gaming--for charitable purposes--such gaming may lawfully be conducted on Indian lands provided it is authorized by a tribal ordinance and is carried out pursuant to a tribal-state compact." Karr Pet. App. A at A12; Dalton Pet. App. D at 16a.

The New York Court of Appeals expressly rejected the petitioners' arguments that IGRA violated state sovereignty,

concluding that "[t]hrough IGRA the states are granted a certain degree of authority over Class III gaming that they otherwise would not have due to the sovereignty of Indian nations. Thus, through the compacting process, IGRA confers a benefit on the state by allowing it to negotiate and to have some input into how Class III gaming will be conducted." Karr Pet. App. A at A13; Dalton Pet. App. D at 17a. Indian gaming is permitted in New York "with or without the state's involvement. Given the consequence, obviously state involvement and regulation is to be favored." Karr Pet. App. A at A14; Dalton Pet. App. D at 19a.

The court therefore concluded that "since 'as a matter of criminal law and public policy' Class III gaming activity is not prohibited in New York, and although heavily regulated, it is permitted for charitable and other purposes, IGRA's mandate allows the State to play an important and essential role in regulating gambling on Indian lands." Karr Pet. App. A at A32; Dalton Pet. App. D at 33a.

REASONS FOR DENYING THE WRIT

I. Contrary To Petitioners' Claim, There Are No Conflicts Over IGRA-Related Questions That Are Presented By This Case

Petitioners now proclaim "widespread conflict" where there is none. Moreover, they ask this Court to resolve IGRA-related questions that are not presented by this case.

The Dalton petition asserts a conflict between the decision below and decisions of other courts "regarding the extent of IGRA preemption." Dalton Pet. 11. However, neither these courts nor any others have reached conflicting conclusions as to whether IGRA pre-empts state laws as applied to Indian gaming. As the United States Senate stated when it enacted IGRA, the Act "is intended to expressly *preempt* the field in the governance of gaming activities on Indian lands.

Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed." S. Rep. No. 100-446, at 6, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076 (emphasis added). None of the cases cited by petitioners have held to the contrary.

The Dalton petitioners cite a conflict between the New York Court of Appeals decision here and *Hotel Employees & Restaurant Employees International Union v. Davis*, 981 P.2d 990 (Cal. 1999), but that case is readily distinguishable. In *Hotel Employees*, the California Supreme Court invalidated an initiative statute that purported to authorize certain forms of gaming at Indian casinos because, pursuant to California's constitution, the people by initiative did not have the power to authorize those particular games. In contrast, here, the New York Court of Appeals determined that the Legislature had the power to authorize gaming compacts with Indian tribes and, through Part B, properly delegated the authority to negotiate such compacts to the Governor. *See* Karr Pet. App. A at A17; Dalton Pet. App. D at 21a-22a. Moreover, unlike the initiative in *Hotel Employees*, Part B does not purport to authorize the Governor of New York to enter into compacts with Indian tribes for games not permitted to be conducted by any other parties under New York law. *See* Karr Pet. App. A at A11 n.4; Dalton Pet. App. D at 16a n.4. Therefore, there is no conflict between the decision here and *Hotel Employees* for this Court to resolve.

Other cases cited by petitioners to demonstrate a purported "conflict" are even farther afield. They concern separation of powers issues not presented by this case. In *Narragansett Indian Tribe v. Rhode Island*, 667 A.2d 280 (R.I. 1995), the Supreme Court of Rhode Island held that absent specific authorization from the General Assembly, under Rhode Island's separation of powers, the Governor of Rhode Island did not have the authority to bind the state to a tribal-

state compact. *See id.* at 282. Notably, the court stated that it "offer[ed] no opinion regarding the rights of any of the parties to engage in and conduct Class III gaming under the Indian Gaming Regulatory Act or to renew negotiations to legally produce a tribal-state compact as contemplated by the provisions of the Gaming Act." *Id.* Similarly, in *State ex. rel Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992), the Supreme Court of Kansas held that, although the Governor had the authority to negotiate with Indian tribes for a tribal-state compact, he lacked the power to bind the state to a compact in the absence of a delegation of power or approval of the compact by the state legislature. *See id.* at 1185. In New York's case, this separation of powers issue was resolved by the New York Court of Appeals' decision in *Saratoga*, which found that the Governor did not have the authority to enter into compacts with Indian tribes in the absence of authorization from the New York State Legislature. 100 N.Y.2d at 824, 798 N.E.2d at 1061, 766 N.Y.S.2d at 668. By enacting Part B, the Legislature expressly granted that necessary authority to the Governor.

The decision below also does not conflict with the Seventh Circuit's decision in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 878 (2005). In *Lac Courte*, the Seventh Circuit examined IGRA's gubernatorial concurrence requirement for taking lands into trust for the benefit of Indian tribes and found that, although the power to take lands into trust rests with the Secretary of the Interior, Congress could make that authority contingent on the concurrence of a state actor, here the Governor. Contrary to petitioners' contention, the court there never reached the question of whether IGRA pre-empted state laws concerning Indian gaming. Rather, it simply found that, with respect to IGRA's land-in-trust provisions at issue there, Congress "reserv[ed]

the ultimate execution of that policy to the federal government." *Id.* at 663.[4]

As the New York Court of Appeals and many other courts have held, "IGRA has preempted the field in the area of Indian gaming." Karr Pet. App. A at A7; Dalton Pet. App. D at 12a; *see also Confederated Tribes of Siletz Indians v. Oregon*, 143 F.3d 481, 486 (9th Cir. 1998); *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996). Petitioners have cited no case that conflicts with that conclusion or any other conclusion reached by the New York

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[4] Other cases cited by petitioners stand for the unremarkable proposition, consistent with IGRA, that where a particular type of game is absolutely prohibited to all within a state, it can also be prohibited for Indian tribes. *See Northern Arapaho Tribe v. Wyoming*, 389 F.3d 1308, 1310-11 (10th Cir. 2004) (finding that some courts have applied a "game-specific" approach in analyzing whether states must negotiate with tribes to conduct certain types of gaming); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1260 (9th Cir. 1994), *amended*, 99 F.3d 321 (9th Cir. 1996) (holding that California was not obligated to negotiate with Indian tribes over banked or percentage card games because those forms of Class III gaming were illegal for any person under state law, but remanding the case to the district court to determine "whether California permits the operation of slot machines in the form of the state lottery or otherwise," such that the state would have to negotiate with tribes regarding that Class III activity); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 279 (8th Cir. 1993) ("We agree with the state that it need not negotiate traditional keno if only video keno is permitted in South Dakota."); *American Greyhound Racing v. Hull*, 146 F. Supp. 2d 1012, 1063 (D. Ariz. 2001) (holding that where a form of Class III gaming is prohibited by a state, a state is not required to negotiate for the conduct of that gaming with Indian tribes), *vacated*, 305 F.3d 1015 (9th Cir. 2002). This issue was not raised below, as the petitioners "have challenged the authority to enter into tribal-state compacts in general, rather than the authority to negotiate for particular games." Karr Pet. App. A at A11 n.4; Dalton Pet. App. D at 16a n.4 Therefore, it is not properly presented here.

Court of Appeals. Therefore, because there is no conflict for this Court to resolve, it should deny these petitions.

II. Petitioners' Other Arguments Provide No Basis For Granting Review

Petitioners contend that plenary review is warranted for a host of other reasons. As explained below, most are irrelevant, and none has merit.

A. IGRA Does Not Violate State Sovereignty

Both the Dalton and Karr petitions contend that application of ordinary principles of pre-emption in this case would improperly "empower" the New York Legislature to act in violation of the State Constitution. Petitioners' arguments fall wide of the mark.

Petitioners do not dispute that, in the absence of IGRA, Indian tribes would be permitted to operate casinos on tribal land free of any regulation by the states. As this Court has stated: "The whole intercourse between the United States and [Indian] nation[s], is, by our Constitution and laws, vested in the government of the United States." *McClanahan*, 411 U.S. at 169. Under the Indian Commerce Clause, states "have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe*, 517 U.S. at 62.

By enacting IGRA, Congress afforded the states a role (if they choose to accept it) in the regulation of Indian gaming that they would not otherwise have had. IGRA does not force a state to accept a particular compact or compel the state to regulate Indian gaming on behalf of the Federal Government. To be sure, if state officials do not negotiate with Indian tribes, or if they do so in bad faith, the Secretary of the Interior may simply *direct* that gaming be allowed—a point petitioners concede. Dalton Pet. 7; Karr Pet. 16. Thus, petitioners are reduced to arguing that state sovereignty would

not be violated if Congress simply ignored the states and directed that gambling be permitted nationwide on tribal lands, but that state sovereignty somehow is violated here because Congress has given states the opportunity to participate in the process. *See* Karr Pet. 6-7. This makes little sense as a matter of logic and is incorrect as a matter of law. *See New York v. United States*, 505 U.S. 144, 167 (1992) ("[W]e have recognized Congress' power to offer States the choice of regulating [ ] activity according to federal standards or having state law pre-empted by federal regulation."); *see also Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 764-65 (1982) (holding that rather than entirely pre-empting a field, Congress may adopt a less intrusive scheme that would allow states to participate in regulation).

Moreover, even if petitioners' characterization that the New York Legislature has been "empowered" by IGRA were accurate, that would not amount to a constitutional violation in any event. This Court has never held that application of ordinary pre-emption principles in a way that alters otherwise governing state law is unconstitutional. *See Rose v. Arkansas State Police*, 479 U.S. 1 (1986) (invalidating Arkansas workers' compensation statute, which authorized the state to offset benefits received under federal statute, because it conflicted with federal Benefits Act); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (holding that Oklahoma could not require cable operators to delete advertisements for alcoholic beverages contained in out of state programming because Oklahoma's prohibitions were pre-empted by federal law).

Petitioners also argue that New York has been compelled by Congress to engage in conduct against the will of state officials and the citizens of New York who elected them. *See* Dalton Pet. 20. However, petitioners' argument ignores the fact that the New York Legislature voluntarily enacted the law they now challenge. The Legislature—a rep-

resentative body elected by, and accountable to, the people of New York—has now affirmed, in the clearest possible terms, that it wants Indian casino gambling in New York State. If, as petitioners insist, the Governor and Legislature have violated the will of the people, the problem is properly addressed through the electoral process.

B. The Decision Below Is Entirely Consistent With This Court's Rulings On Federalism And State Sovereignty

The Dalton petition suggests that the decision below "undermines this Court's recent rulings reaffirming the concepts of federalism and dual sovereignty." Dalton Pet. 19. Petitioners characterize these cases as "protect[ing] the states against unwarranted usurpations of their prerogatives by an overreaching Congress," and then assert that application of ordinary principles of federal pre-emption in this case amounts to an "unwarranted usurpation" of state power. *Id.* at 19-21. This argument, however, is contradicted by petitioners' own claim that IGRA has improperly "empowered" state legislatures. Moreover, petitioners have not and cannot identify a state power that has been "usurped" here, as the power to regulate Indian tribes and their activities on their lands is not a power "reserved to the States" under the Tenth Amendment. U.S. Const. Art. I, § 8, cl. 3; *id.* Art. II, § 2, cl. 2; *see also Cabazon*, 480 U.S. at 207 ("'[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.'").

Contrary to petitioners' contention, the lower court's decision is entirely consistent with this Court's rulings on federalism and state sovereignty. Indeed, this Court has consistently upheld legislation, like IGRA, that allows the states the option of assuming a regulatory role in a pre-emptable area.

Only where, unlike here, legislation directly compels the states to enact and enforce a regulatory program has this Court intervened. For example, in *New York v. United*

States, 505 U.S. 144 (1992), this Court reaffirmed that Congress cannot "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 161. In *New York*, the Court invalidated the "take-title" provision of the Low-Level Radioactive Waste Policy Act, which forced the state to choose between enacting a federal regulatory program or taking title to radioactive waste. *Id.* at 176-77. This Court found that because Congress could not constitutionally impose either option, presenting states with a choice between these two options was also impermissible. *See id.* The Court reached a similar conclusion in *Printz v. United States*, 521 U.S. 898 (1997), where the Court held that certain interim provisions of the Brady Handgun Violence Prevention Act which would require state law enforcement officers to conduct background checks for prospective handgun purchasers were unconstitutional because those provisions would have compelled law enforcement officials to participate in a federal regulatory scheme.

In contrast, state sovereignty is not infringed by statutes such as IGRA that invite the states to regulate in an otherwise pre-emptable field. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981), this Court considered provisions of the Surface Mining Control and Reclamation Act which prescribed federal minimum standards governing surface coal mining which a state could either implement itself or else yield to a federally administered regulatory program. This Court rejected coal producers' Tenth Amendment challenge to these provisions, finding that "Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining. We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role." *Id.* at 290. Similarly, in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982) ("*FERC*"), this Court upheld provisions of the

Public Utility Regulatory Policies Act of 1978, which require states to consider adopting federal rate structures and regulatory standards. The Court found that the Act "should not be invalid simply because, out of deference to state authority, Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they *consider* the suggested federal standards." *Id.* at 765 (emphasis in original).

Like the statutes in *Hodel* and *FERC*, IGRA does not compel the states to enact or enforce a federal program. Rather, Congress has given states a power—the ability to exercise some degree of regulation over gaming activities on tribal lands—that they would not otherwise possess under the Constitution. If the states choose not to exercise this power, the only consequence is that they lose their ability to influence the terms under which gaming will occur. *See* 25 U.S.C. § 2710(d)(B)(vii); *see also Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993) (holding that IGRA does not violate the Tenth Amendment because IGRA "gives states the right to get involved in negotiating a gaming compact because of the obvious state interest in gaming casino operations within the state boundaries, but does not compel it"); *Yavapi-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292, 1297 (D. Ariz. 1992) (rejecting a Tenth Amendment challenge because "IGRA's terms do not force the State to enter into a compact").

Accordingly, IGRA's statutory scheme, which gives states a potential role in regulating gaming on Indian lands where they would otherwise have none, cannot possibly offend state sovereignty under the Tenth Amendment.

C. There Are No Issues Of State Concern Presented By This Case

Petitioners contend that there are issues of state concern that should be resolved by this case. As explained below, none of these purported issues supports review by this Court.

a. The Dalton petition devotes several pages to quoting from a National Governors Association position paper addressing Indian gaming and taxation. *See* Dalton Pet. 15-18. The paper in question, however, simply notes that the Association is focusing on implementing IGRA, not that further guidance from this Court is needed. Indeed, the Governors acknowledge that once the scope of permissible gaming in a state is determined, "States and tribes can then negotiate to operate those gaming activities and devices in the state."[5]

b. The Dalton petition notes that a group of state attorneys general filed an *amicus* brief in *Seminole Tribe* and suggests that the same issues are implicated here. But *Seminole Tribe* was decided nearly a decade ago and presented very different issues than this case. Moreover, the Attorney Generals' complaint regarding state sovereignty in *Seminole Tribe* was that a state was not only encouraged to enter into a compact but could be coerced into engaging in negotiations with Indian tribes because otherwise it could be "hauled into federal court under a claim it failed to negotiate in good faith." Brief of Amicus Curiae States of California et al., 1995 WL 17008502, at *25, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). This Court resolved that concern in *Seminole Tribe* by precluding Indian tribes from directly suing states without the states' consent. *See* 517 U.S. at 761.

c. Petitioners also point to various states' laws and constitutional provisions that limit gambling activity, while allowing that gambling to be conducted by charitable or other organizations. These state laws, however, are not cause for any "concern" or "confusion," nor are they of any signifi-

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[5] National Governors Ass'n, The Role of States, the Federal Government, and Indian Tribal Governments with Respect to Indian Gaming and Taxation Issues § 6.5.1, *available at* http://www.nga.org/portal/site/nga/menuitem.8358ec82f5b198d18a278110501010a0/?vgnextoid=2caa9e2f1b091010VgnVCM1000001a01010aRCRD.

cance here, as petitioners have cited no case—and we are aware of none—where any court anywhere has ever held that a state may prevent Indian tribes from conducting types of gaming that it permits any other party within the state to conduct. The Dalton petitioners maintain that the application of IGRA creates an "awkward" situation for governors whose states' gambling regulations are pre-empted by federal law. As previously explained, however, states and their governors do not have authority to regulate gaming on Indian lands, except to the extent agreed to by a tribe and state in the compacting process. Therefore, this purported "awkwardness" cannot be a reason for granting review. Dalton Pet. 18.

D. The Court Of Appeals Correctly Interpreted IGRA

Finally, the Dalton petition contends that the New York Court of Appeals misapplied IGRA in concluding that, "if Class III gaming is permitted in the state for any purpose, including a strictly charitable purpose, it will be permitted on Indian land with or without the state's involvement." Dalton Pet. 21 (quoting Dalton Pet. App. D. at 18a-19a). But the language of the statute is crystal clear. Indian tribes will be permitted to conduct Class III gaming on tribal lands when "located in a State that permits such gaming for *any purpose by any person, organization, or entity*." 25 U.S.C. § 2710(d)(1)(B) (emphasis added); Karr Pet. App. A at A12; Dalton Pet. App. D at 16a.

Petitioners ignore IGRA's plain language and would have this Court read "such gaming" and "any purpose" to mean "commercial gaming" and "commercial purpose." As the New York Court of Appeals and other courts have recognized, petitioners' tortured interpretation of IGRA would render this provision meaningless. *See* Karr Pet. App. A at A14; Dalton Pet. App. D at 18a-19a, *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1032 (2d Cir. 1990) (holding that because Connecticut law permitted certain "games of

chance" at charitable "Las Vegas nights," and allowed other forms of gambling, Indian tribes were also permitted to conduct those games under IGRA). Although petitioners insist that IGRA's legislative history supports their position, *see* Dalton Pet. 21, that history, in fact, makes clear that Congress *did not* intend to distinguish between prohibited "commercial gambling" and permitted "charitable gambling" within the same state. As the United States Senate explained in enacting IGRA:

> The phrase 'for any purpose by any person, organization or entity' makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.

S. Rep. No. 100-446, at 12, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3082; Karr Pet. App. A at A11 n.3; Dalton Pet. App. D at 15a n.3 ("Although the portion of the legislative history specifically discussing the prohibitory/regulatory distinction was referring to Class II gaming, the applicable language in IGRA is virtually identical with respect to Class II and Class III gaming.") (citations omitted).[6]

In any event, a statute's legislative history "makes no difference" where, as here, the language is clear. *Toibb v. Radloff*, 501 U.S. 157, 164 (1991).

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[6] *See also Mashantucket*, 913 F.2d at 1029-30 (finding the legislative history of Section 2710(b)(1)(A) "instructive with respect to the meaning of the identical language" in Section 2710(d)(1)(B)); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F. Supp. 480, 485 (D. Wis. 1991) ("Although the Senate committee was speaking of class II activities, its comments are equally applicable to the requirements for class III activities.").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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